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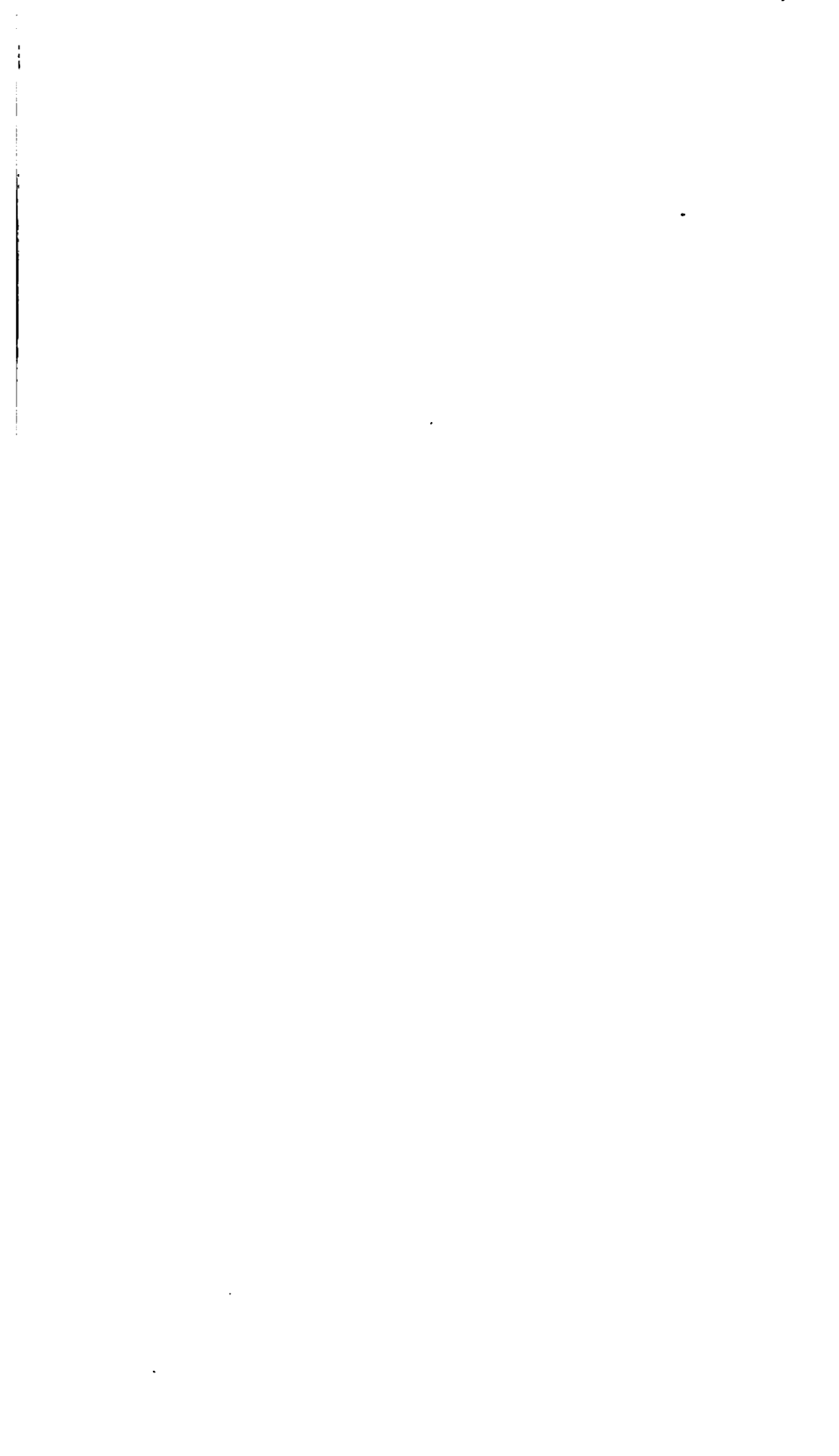
















THE  
**AMERICAN DECISIONS**

CONTAINING THE

**CASES OF GENERAL VALUE AND AUTHORITY**

DECIDED IN

**THE COURTS OF THE SEVERAL STATES**

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO  
THE YEAR 1869.**

COMPILED AND ANNOTATED

**By A. C. FREEMAN,**

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"  
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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# AMERICAN DECISIONS.

VOL. XXVII.

---

The cases re-reported in this Volume will be found originally reported in the following State Reports:

|  |                         |            |
|--|-------------------------|------------|
| GREEN'S NEW JERSEY LAW REPORTS.        | - Vol. 2.               | 1834.      |
| PAIGE'S N. Y. CHANCERY REPORTS.        | - - - Vol. 4.           | 1834.      |
| WENDELL'S NEW YORK REPORTS.            | - - - Vols. 11, 12, 13. | 1834.      |
| DEVEREUX'S N. CAROLINA LAW REPORTS.    | - Vol. 4.               | 1834.      |
| DEVEREUX & BATTLE'S N. C. LAW REPORTS. | Vol. 1.                 | 1834.      |
| DEVEREUX'S N. CAROLINA EQUITY REPORTS. | Vol. 2.                 | 1834.      |
| DEVEREUX & BATTLE'S N. C. EQ. REPORTS. | Vol. 1.                 | 1834.      |
| OHIO REPORTS.                          | - - - - - Vol. 6.       | 1834.      |
| RAWLE'S PENNSYLVANIA REPORTS.          | - - - Vol. 4.           | 1834.      |
| WATTS' PENNSYLVANIA REPORTS.           | - - - Vols. 2, 3.       | 1834.      |
| HILL'S SOUTH CAROLINA REPORTS.         | - - - Vol. 2.           | 1834-1835. |
| HILL'S S. CAROLINA CHANCERY REPORTS.   | Vols. 1, 2.             | 1833-1834. |
| YERGER'S TENNESSEE REPORTS.            | - - - Vols. 6, 7.       | 1834-1835. |
| VERMONT REPORTS.                       | - - - - - Vol. 6.       | 1834.      |
| LEIGH'S VIRGINIA REPORTS.              | - - - - - Vol. 5.       | 1834.      |
| PORTER'S ALABAMA REPORTS.              | - - - - Vols. 1, 2.     | 1835.      |
| CONNECTICUT REPORTS.                   | - - - - - Vols. 10, 11. | 1835-1836. |
| HARRINGTON'S DELAWARE REPORTS.         | - - Vol. 1.             | 1835.      |
| SCAMMON'S ILLINOIS REPORTS.            | - - - - Vol. 1.         | 1835.      |





# AMERICAN DECISIONS.

VOL. XXVII.

## CASES REPORTED.

| NAME.                                | SUBJECT.                          | REPORT.           | PAGE. |
|--------------------------------------|-----------------------------------|-------------------|-------|
| Avent v. Read .....                  | <i>Ejectment</i> .....            | 2 Porter .....    | 663   |
| Aymar v. Sheldon .....               | <i>Neg. instruments</i> .....     | 12 Wendell .....  | 137   |
| Bank of Utica v. City of Utica ..... | <i>Taxation</i> .....             | 4 Paige Ch. ....  | 72    |
| Barhydt v. Valk .....                | <i>False imprisonment</i> .....   | 12 Wendell .....  | 124   |
| Battle v. Bering .....               | <i>Executions</i> .....           | 7 Yerger .....    | 523   |
| Beebe v. Bull .....                  | <i>Set-off</i> .....              | 12 Wendell .....  | 150   |
| Beebe v. Robert .....                | <i>Sale by sample</i> .....       | 12 Wendell .....  | 132   |
| Belknap v. Gleason .....             | <i>Stat. of limitations</i> ..... | 11 Connecticut .. | 721   |
| Bell v. Coiel .....                  | <i>Evidence</i> .....             | 2 Hill Ch. ....   | 448   |
| Beltzhoover v. Blackstock .....      | <i>Neg. instruments</i> .....     | 3 Watts .....     | 330   |
| Black v. Caldwell .....              | <i>Executions</i> .....           | 4 Rawle .....     | 274   |
| Blackstone v. Blackstone .....       | <i>Specific legacies</i> .....    | 3 Watts .....     | 359   |
| Blade v. Noland .....                | <i>Lost notes</i> .....           | 12 Wendell .....  | 123   |
| Blood v. Goodrich .....              | <i>Agency</i> .....               | 12 Wendell .....  | 152   |
| Boisseau v. Aldridges .....          | <i>Wills</i> .....                | 5 Leigh .....     | 590   |
| Boorman v. Jenkins .....             | <i>Sale by sample</i> .....       | 12 Wendell .....  | 153   |
| Brainard v. Stilphin .....           | <i>Executions</i> .....           | 6 Vermont .....   | 532   |
| Bristol v. Dann .....                | <i>Evidence</i> .....             | 12 Wendell .....  | 123   |
| Brown v. Manning .....               | <i>Dedication</i> .....           | 6 Ohio .....      | 255   |
| Brown's Ex'r v. Higginbotham ..      | <i>Partnership</i> .....          | 5 Leigh .....     | 618   |
| Burlington, Town of, v. Fosby ..     | <i>Bastards</i> .....             | 6 Vermont .....   | 535   |
| Butler v. Maynard .....              | <i>Executions</i> .....           | 11 Wendell .....  | 100   |
| Camp v. Bates .....                  | <i>Waste</i> .....                | 11 Connecticut .. | 707   |
| Carroll v. Boaley .....              | <i>Administrators</i> .....       | 6 Yerger .....    | 460   |
| Chamberlain v. Bates .....           | <i>Administrators</i> .....       | 2 Porter .....    | 667   |
| Clark v. Russel .....                | <i>Forbearance</i> .....          | 3 Watts .....     | 343   |
| Colby v. Reynolds .....              | <i>Libel</i> .....                | 6 Vermont .....   | 574   |
| Collins v. Allen .....               | <i>Set-off</i> .....              | 12 Wendell .....  | 130   |
| Colwell v. Woods .....               | <i>Mortgages</i> .....            | 3 Watts .....     | 345   |
| Comegys v. Carley .....              | <i>Stat. of limitations</i> ..    | 3 Watts .....     | 356   |
| Commons v. Walters .....             | <i>Slander</i> .....              | 1 Porter .....    | 635   |
| Corbett v. Roche .....               | <i>Agency</i> .....               | 2 Hill .....      | 387   |

| NAME.                              | SUBJECT.                         | REPORT.               | PAGE. |
|------------------------------------|----------------------------------|-----------------------|-------|
| Costelo v. Cave .....              | <i>Covenants</i> .....           | 2 Hill .....          | 404   |
| Crary v. Sprague .....             | <i>Fraud't combination</i> ..... | 12 Wendell .....      | 110   |
| Crest v. Jack .....                | <i>Improvements</i> .....        | 3 Watts .....         | 353   |
| Den v. Graham .....                | <i>Boundaries</i> .....          | 1 Dev. & Bat. ....    | 226   |
| Derby Turnpike Co. v. Parks .....  | <i>Legislative grant</i> .....   | 10 Connecticut ...    | 700   |
| Dickins v. Jones .....             | <i>Mistake</i> .....             | 6 Yerger .....        | 488   |
| Dows v. Harper .....               | <i>Writs of error</i> .....      | 6 Ohio .....          | 270   |
| Duke v. Harper .....               | <i>Landlord and tenant</i> ..... | 6 Yerger .....        | 462   |
| Duncan v. Martin .....             | <i>Legacies</i> .....            | 7 Yerger .....        | 525   |
| Dyer v. Tuscaloosa Bridge Co. .... | <i>Franchises</i> .....          | 2 Porter .....        | 655   |
| Earnest v. Parke .....             | <i>Insolvency</i> .....          | 4 Rawle .....         | 280   |
| Erwin v. Oldham .....              | <i>Creditor's bill</i> .....     | 6 Yerger .....        | 458   |
| Everson v. Kirtland .....          | <i>Covenant to convey</i> ..     | 4 Paige Ch. ....      | 91    |
| Ewell v. State .....               | <i>Incest</i> .....              | 6 Yerger .....        | 480   |
| Fraser v. Boone .....              | <i>Devises</i> .....             | 1 Hill Ch. ....       | 422   |
| French v. Commonwealth .....       | <i>Escheats</i> .....            | 5 Leigh .....         | 613   |
| Frierson v. Van Buren .....        | <i>Wills</i> .....               | 7 Yerger .....        | 528   |
| Gates v. Green .....               | <i>Landlord and tenant</i> ..    | 4 Paige Ch. ....      | 68    |
| Gee's Adm'r v. Williamson .....    | <i>Stare decisis</i> .....       | 1 Porter .....        | 628   |
| Gillespie v. Bradford .....        | <i>Vendor's lien</i> .....       | 7 Yerger .....        | 494   |
| Gordon v. Stevens .....            | <i>Dower</i> .....               | 2 Hill Ch. ....       | 445   |
| Hale v. Henrie .....               | <i>Executions</i> .....          | 2 Watts .....         | 289   |
| Hall v. Howd .....                 | <i>Process</i> .....             | 10 Connecticut ...    | 696   |
| Harper v. Blean .....              | <i>Devises</i> .....             | 3 Watts .....         | 367   |
| Harrington v. McShane .....        | <i>Common carriers</i> .....     | 2 Watts .....         | 321   |
| Harrison v. Hicks .....            | <i>Payment</i> .....             | 1 Porter .....        | 638   |
| Harrison v. Lane .....             | <i>Suretyship</i> .....          | 5 Leigh .....         | 607   |
| Haughy v. Strang .....             | <i>Judgments</i> .....           | 2 Porter .....        | 648   |
| Hawkins v. State .....             | <i>Pardons</i> .....             | 1 Porter .....        | 641   |
| Haynes v. Sledge .....             | <i>Dies non juridicus</i> ..     | 2 Porter .....        | 665   |
| Hemmich v. High .....              | <i>Infants</i> .....             | 2 Watts .....         | 295   |
| Hickman v. Caldwell .....          | <i>Executions</i> .....          | 4 Rawle .....         | 274   |
| Hinchman v. Lawson .....           | <i>Slander</i> .....             | 5 Leigh .....         | 622   |
| Hone v. Henriques .....            | <i>Assignments</i> .....         | 13 Wendell .....      | 204   |
| Hoy v. Sterrett .....              | <i>Water-courses</i> .....       | 2 Watts .....         | 313   |
| Jacaway v. Dula .....              | <i>Assault</i> .....             | 7 Yerger .....        | 492   |
| Johnson v. Boyer .....             | <i>Bail</i> .....                | 3 Watts .....         | 363   |
| Johnson v. Cawthorn .....          | <i>Vendor's lien</i> .....       | 1 Dev. & Bat. Eq. ... | 250   |
| Kellogg v. Robinson .....          | <i>Covenants</i> .....           | 6 Vermont .....       | 550   |
| King v. Cohorn .....               | <i>Fraud't contracts</i> .....   | 6 Yerger .....        | 455   |
| Kinloch v. Hamlin .....            | <i>Partnership</i> .....         | 2 Hill Ch. ....       | 441   |
| Kip v. Norton .....                | <i>Boundaries</i> .....          | 12 Wendell .....      | 120   |
| Kisler v. Kisler .....             | <i>Trusts</i> .....              | 2 Watts .....         | 308   |
| Klingensmith v. Bean .....         | <i>Orphans' court</i> .....      | 2 Watts .....         | 328   |
| Kottman, In matter of .....        | <i>Habeas corpus</i> .....       | 2 Hill .....          | 390   |

| NAME.                                | SUBJECT.                         | REPORT.           | PAGE. |
|--------------------------------------|----------------------------------|-------------------|-------|
| Lamb v. Lathrop.....                 | <i>Tender</i> .....              | 13 Wendell.....   | 174   |
| Ligget v. Smith.....                 | <i>Covenant</i> .....            | 3 Watts.....      | 358   |
| Lloyd v. Brewster.....               | <i>Practice</i> .....            | 4 Paige Ch.....   | 88    |
| Lodge v. Patterson.....              | <i>Co-tenancy</i> .....          | 3 Watts.....      | 335   |
| Longworth v. Screven.....            | <i>Audita querela</i> .....      | 2 Hill.....       | 381   |
| Lowrey v. Murrell.....               | <i>Payment</i> .....             | 2 Porter.....     | 651   |
| Lyman v. Hale.....                   | <i>Real estate</i> .....         | 11 Connecticut... | 728   |
| Markland v. Crump.....               | <i>Covenants</i> .....           | 1 Dev. & Bat....  | 230   |
| Marsh v. Scarboro.....               | <i>Legacies</i> .....            | 2 Dev. Eq.....    | 248   |
| Marshall v. Colvert.....             | <i>Suretyship</i> .....          | 5 Leigh.....      | 589   |
| Martin v. Wilbourne.....             | <i>Sheriff's deeds</i> .....     | 2 Hill.....       | 393   |
| Mayor of Memphis v. Wright.....      | <i>Eminent domain</i> .....      | 6 Yerger.....     | 499   |
| McAlister's Adm'r's v. Sorice.....   | <i>Liability of officers</i> ..  | 7 Yerger.....     | 504   |
| McCoy's Adm'r's v. Bixbee's Adm'r's  | <i>Covenant to convey</i> ..     | 6 Ohio.....       | 258   |
| McDowell v. Simpson.....             | <i>Agency</i> .....              | 3 Watts.....      | 338   |
| McEldery v. McKenzie.....            | <i>Executors</i> .....           | 2 Porter.....     | 643   |
| McElyea v. Hayter.....               | <i>Power of attorney</i> ..      | 2 Porter.....     | 645   |
| McGregor v. Kilgore.....             | <i>Common carriers</i> ...       | 6 Ohio.....       | 260   |
| McLoud v. Selby.....                 | <i>School districts</i> .....    | 10 Connecticut... | 689   |
| McKain v. Love.....                  | <i>Verdicts</i> .....            | 2 Hill.....       | 401   |
| Merrills v. Tariff Mfg. Co.....      | <i>Measure of damages</i> ..     | 10 Connecticut... | 682   |
| Merriwether v. Garvin.....           | <i>Judgments</i> .....           | 2 Porter.....     | 650   |
| Mohawk Bank v. Broderick.....        | <i>Neg. instruments</i> ...      | 13 Wendell.....   | 192   |
| Morton v. Bailey.....                | <i>Set-off</i> .....             | 1 Scammon.....    | 767   |
| Murphy v. Higginbottom.....          | <i>Executions</i> .....          | 2 Hill.....       | 395   |
| Myers v. Hodges.....                 | <i>Administrators</i> .....      | 2 Watts.....      | 319   |
| New London etc. Bank v. Lee.....     | <i>Mortgages</i> .....           | 11 Connecticut... | 713   |
| Nichol v. Bate.....                  | <i>Neg. instruments</i> ...      | 7 Yerger.....     | 505   |
| Noyes v. Evans.....                  | <i>Res adjudicata</i> .....      | 6 Vermont.....    | 579   |
| Omelvany v. Jagers.....              | <i>Water-courses</i> .....       | 2 Hill.....       | 417   |
| Ontario Bank v. Lightbody.....       | <i>Payment</i> .....             | 13 Wendell.....   | 179   |
| Owen v. Hyde.....                    | <i>Dower</i> .....               | 6 Yerger.....     | 467   |
| People v. Corporation of Albany..... | <i>Nuisances</i> .....           | 11 Wendell.....   | 95    |
| People v. Enoch.....                 | <i>Criminal law</i> .....        | 13 Wendell.....   | 197   |
| People v. Peck.....                  | <i>Religious corporations</i> .. | 11 Wendell.....   | 104   |
| Perrine v. Bergen.....               | <i>Writ of possession</i> ..     | 2 Green Law....   | 63    |
| Poore v. Price.....                  | <i>Mortgages</i> .....           | 5 Leigh.....      | 582   |
| Prince v. Case.....                  | <i>License</i> .....             | 10 Connecticut... | 675   |
| Purple v. Horton.....                | <i>Slander</i> .....             | 13 Wendell.....   | 167   |
| Ramsay's Appeal.....                 | <i>Judgments—Set-off</i> ..      | 2 Watts.....      | 301   |
| Randolph v. Perry.....               | <i>Contracts</i> .....           | 2 Porter.....     | 659   |
| Redmond v. Collins.....              | <i>Probate</i> .....             | 4 Dev.....        | 208   |
| Reeves v. Dougherty.....             | <i>Stat. of limitations</i> ..   | 7 Yerger.....     | 496   |
| Rhoads v. Gaul.....                  | <i>Evidence</i> .....            | 4 Rawle.....      | 277   |
| Richards v. Hunt.....                | <i>Compromise</i> .....          | 6 Vermont.....    | 545   |
| Roach v. Martin's Lessee.....        | <i>Devises</i> .....             | 1 Harrington...   | 746   |
| Rogers v. Rogers.....                | <i>Husband and wife</i> ...      | 4 Paige Ch.....   | 84    |

| NAME.                                | SUBJECT.                       | REPORT.          | PAGE. |
|--------------------------------------|--------------------------------|------------------|-------|
| Saunders v. Stotts.....              | <i>Pleading</i> .....          | 6 Ohio .....     | 263   |
| Sayles v. Smith.....                 | <i>Dies non juridicus</i> ..   | 12 Wendell ..... | 117   |
| Shaw v. Clark.....                   | <i>Payment</i> .....           | 6 Vermont.....   | 578   |
| Slocumb v. Knykendall.....           | <i>Slander</i> .....           | 1 Scammon .....  | 764   |
| Smith v. McManus.....                | <i>Neg. instruments</i> ...    | 7 Yerger.....    | 519   |
| Smith v. Smith.....                  | <i>Divorce</i> .....           | 4 Paige Ch.....  | 75    |
| Spurgeon v. McElwain.....            | <i>Illegal contracts</i> ....  | 6 Ohio .....     | 266   |
| State v. Boyd.....                   | <i>Husband and wife</i> ..     | 2 Hill.....      | 376   |
| State v. De Witt.....                | <i>Conspiracy</i> .....        | 2 Hill.....      | 371   |
| State v. Ferguson.....               | <i>Homicide</i> .....          | 2 Hill.....      | 412   |
| State v. Hill.....                   | <i>Depositions</i> .....       | 2 Hill.....      | 406   |
| State v. Kitchens.....               | <i>Executions</i> .....        | 2 Hill.....      | 410   |
| State v. Solomons.....               | <i>Appeals</i> .....           | 6 Yerger.....    | 469   |
| State v. Trask.....                  | <i>Dedication</i> .....        | 6 Vermont.....   | 554   |
| Stiles v. Stewart.....               | <i>Judgments</i> .....         | 12 Wendell ..... | 142   |
| Stoney v. Shultz.....                | <i>Mortgages</i> .....         | 1 Hill Ch.....   | 429   |
| Stouffer v. Latahaw.....             | <i>Duress</i> .....            | 2 Watts.....     | 297   |
| Sturtevant v. Goode.....             | <i>Equity</i> .....            | 5 Leigh.....     | 586   |
| Sumner v. Murphy.....                | <i>Adverse possession</i> ..   | 2 Hill.....      | 397   |
| Swan's Lessee v. Parker.....         | <i>Executions</i> .....        | 7 Yerger.....    | 522   |
| Taul v. Campbell.....                | <i>Husband and wife</i> ..     | 7 Yerger.....    | 508   |
| Taylor v. Griswold.....              | <i>Corporations</i> .....      | 2 Green Law....  | 33    |
| Terry v. Eslava.....                 | <i>Measure of damages</i> ..   | 1 Porter.....    | 626   |
| Topham v. Roche.....                 | <i>Agency</i> .....            | 2 Hill.....      | 387   |
| Townsend v. Houston.....             | <i>Specific performance</i> .. | 1 Harrington.... | 732   |
| Trustees of Watertown v. Cowen.....  | <i>Dedication</i> .....        | 4 Paige Ch.....  | 80    |
| Tubbs v. Richardson.....             | <i>Co-tenancy</i> .....        | 6 Vermont.....   | 570   |
| Turney v. Wilson.....                | <i>Common carriers</i> ...     | 7 Yerger.....    | 515   |
| Universalist Church v. Trustees..... | <i>Mandamus</i> .....          | 6 Ohio .....     | 267   |
| Vanderzee v. McGregor.....           | <i>Priv. communications</i> .. | 12 Wendell ..... | 156   |
| Vicary v. Moore.....                 | <i>Evidence</i> .....          | 2 Watts.....     | 323   |
| Ward v. Stow.....                    | <i>Devises</i> .....           | 2 Dev. Eq.....   | 238   |
| Watson v. Trask.....                 | <i>Libel</i> .....             | 6 Ohio .....     | 271   |
| Wright v. Clear.....                 | <i>Pleading</i> .....          | 6 Vermont.....   | 538   |
| Yeatman v. Woods.....                | <i>Priv. &amp;c</i> .....      | 6 Yerger.....    | 452   |

## CASES CITED.

|                                  | PAGE |                                   | PAGE                 |
|----------------------------------|------|-----------------------------------|----------------------|
| Abat v. Rion.....                | 522  | Arnold v. Kempstead.....          | 446                  |
| Abbott's appeal.....             | 295  | Arthur v. Schooner Cassis.....    | 262                  |
| Abbott v. Mills.....84, 258,     | 561  | Artisans' Bank v. Park Bank....   | 142                  |
| Adair v. McDaniel.....           | 397  | Ashley v. Hill.....               | 722                  |
| Adair v. New River Co.....       | 258  | Ashmead v. Colby.....             | 721                  |
| Adams v. Butta.....              | 224  | Ashmun v. Williams.....           | 676                  |
| Adams v. Memphis etc. R. R. Co.  | 492  | Astley v. Astley.....             | 79                   |
| Adams v. Rockwell.....           | 122  | Atkins v. Banwell.....            | 287                  |
| Adams v. Saratoga & W. R. R.     | 84   | Atkinson v. Jordan.....           | 207                  |
| Adams v. Wiscasset Bank ..694,   | 695  | Attorney-general v. Blount.....   | 82                   |
| Addington's case.....            | 411  | Attorney-general v. Le Marchant   | 484                  |
| Adlum v. Yard.....               | 207  | Attorney-general v. Scott.....    | 55                   |
| Adrianse v. Supervisors of N. Y. | 75   | Attorney-general v. Sothom.....   | 300                  |
| Adsit v. Adsit.....447,          | 448  | Attorney-general v. Stevens.....  | 99                   |
| Agire's case.....                | 378  | Atwater v. Inhabitants of Wood-   | 707                  |
| Ainslie v. Wilson.....192,       | 641  | bridge.....                       | 707                  |
| Albeitz v. Mellon.....           | 334  | Atwater v. Woodbridge.....692,    | 695                  |
| Alderman Sterling's case.....    | 374  | Atwood v. Cobb.....               | 524                  |
| Alexander v. Kerr.....355,       | 356  | Augusta v. Perkins.....           | 568                  |
| Alexander v. Worthington.....    | 633  | Austin v. Bell.....               | 207                  |
| Allen's estate.....              | 745  | Aveson v. Kinniard.....           | 450                  |
| Allen v. Crofoot.....            | 158  | Aymar v. Beers.....               | 197                  |
| Allen v. Culver.....             | 71   | Backus v. Richardson.....         | 272                  |
| Allen v. Papworth.....           | 225  | Badeau v. Mead.....               | 563                  |
| Allen v. Reesor.....             | 304  | Bagley v. McMickle.....           | 129                  |
| Allen v. Trimble.....            | 395  | Bailey's appeal.....              | 321                  |
| Almy v. Wilbur.....              | 727  | Bailey v. Dillon.....             | 285                  |
| Alsop's appeal.....              | 363  | Bailey v. Jackson.....            | 727                  |
| Alsopp v. Patten.....            | 745  | Bailey v. Railroad Co.....        | 63                   |
| Ames v. Norman.....              | 514  | Bailor's Lessee v. De Jarnette. } | 224                  |
| Amis v. Kyle.....119,            | 178  |                                   | 225                  |
| Amory v. McGregor.....           | 262  | Baird v. Blagrove.....            | 324                  |
| Anderson v. Chick.....           | 745  | Baker v. Boston.....              | 98                   |
| Anderson v. Jackson.....         | 763  | Baker v. Freeman.....             | 126                  |
| Anderson v. Tompkins.....        | 343  | Baker v. Jewell.....              | 720                  |
| Andrews v. Estes.....131,        | 695  | Baker v. Johnston.....561,        | 566                  |
| Andrews v. Page.....             | 505  | Baker v. McDuffie.....            | 104                  |
| Ankeny v. Pierce.....            | 192  | Baker v. Rand.....                | 152                  |
| Anne Knee, <i>Ex parte</i> ..... | 392  | Baldwin v. Breed.....             | 681                  |
| Anonymous.....473,               | 717  | Baldwin v. Brown.....             | 122                  |
| Ansley v. Pearson.....           | 152  | Bally v. Wells.....               | 552                  |
| App v. Dreisbach.....            | 502  | Bank v. Dixon.....                | 406                  |
| App's Ex'rs v. Dreisbach.....    | 330  | Bank of Beloit v. Beale.....      | 90                   |
| Apthorp v. Shepard.....          | 192  | Bank of Columbia v. Magruder .    | 508                  |
| Arayo v. Currell.....            | 141  | Bank of Commerce v. Rutland       | etc. R. R. Co: ..... |
| Archer's case.....               | 749  |                                   | 142                  |
| Armstrong v. Baker.....          | 223  | Bank of Lansingburgh v. Crary..   | 104                  |
| Armstrong v. Toler.....          | 648  | Bank of Pennsylvania v. Winger    | 306                  |
| Armstrong v. Cheshire.....       | 650  | Bank of Troy v. Topping.....      | 126                  |
| Arnold v. Gowr.....              | 294  | Bank of U. S. v. Bank of Georgia  | 183                  |

|                                    | PAGE                    |                                    | PAGE               |
|------------------------------------|-------------------------|------------------------------------|--------------------|
| Bank of U. S. v. Sill .....        | 128, 129                | Berry v. Griffith .....            | 524                |
| Bank of Utica v. City of Utica ..  | 75                      | Beasford v. Saunders .....         | 288, 289           |
| Bannon v. Baltimore etc. R. R. Co. | 687                     | Best v. Allen .....                | 686                |
| Barclay v. Howell's Lessee .....   | 569                     | Best v. Barber .....               | 288                |
| Barcroft v. Snodgrass .....        | 455                     | Best v. Strong .....               | 267                |
| Barhydt v. Valk .....              | 126                     | Bickford v. Page .....             | 231, 236           |
| Barker, Matter of .....            | 62                      | Bieber v. Beck .....               | 353                |
| Barker v. Dixie .....              | 450                     | Billings v. Vanderbeck .....       | 177                |
| Barlow v. Williams .....           | 571                     | Binz v. Tyler .....                | 768                |
| Barnes v. Badger .....             | 110                     | Birch v. Baker .....               | 362                |
| Barnes v. Harris .....             | 144, 145, 147           | Birch v. Depeyster .....           | 162                |
| Barney v. Bliss .....              | 178, 580                | Birdseye v. Ray .....              | 103                |
| Barns v. Patch .....               | 247                     | Birely v. Staley .....             | 84, 459            |
| Barrel v. Brown .....              | 192                     | Birmingham v. Kerwan .....         | 447                |
| Bartlett v. Bangor, .....          | 562, 566, 567, 568, 569 | Birney v. Hann .....               | 237, 487, 553      |
| Bartlett v. Pickersgill .....      | 312                     | Bissell v. Gold .....              | 301                |
| Barton v. City of Syracuse .....   | 99                      | Bissell v. Spencer .....           | 690                |
| Bateman v. Bluck .....             | 562                     | Bivens v. Phifer .....             | 248                |
| Bates v. Austin .....              | 466                     | Black v. Black .....               | 745                |
| Bates v. Bates .....               | 178                     | Black v. State .....               | 472, 475           |
| Bates v. Relyea .....              | 632                     | Black, Admr. v. Planters' Bank.    | 528                |
| Batsford v. Every .....            | 120                     | Blade v. Noland .....              | 129                |
| Bauer v. Gottmanhauser .....       | 689                     | Blair v. Coffman .....             | 301                |
| Bayard v. Hargrave .....           | 567, 569                | Blair v. Mathiott .....            | 307                |
| Baxter v. Commonwealth .....       | 569                     | Blanchard v. Baker .....           | 318                |
| Bayard v. Shunk .....              | 188, 191                | Blevins v. Barker .....            | 254                |
| Beach v. Wise .....                | 124                     | Blood v. Goodrich .....            | 156, 344           |
| Beals v. Allen .....               | 103, 277, 528           | Blount v. Darrach .....            | 330                |
| Beals v. Guernsey .....            | 103, 277, 528           | Board etc. v. Edison .....         | 569                |
| Bean v. Atwater .....              | 444                     | Boardman v. Mostyn .....           | 740                |
| Beans v. Emanuelli .....           | 148                     | Boddy v. Kent .....                | 716                |
| Beard v. Campbell .....            | 550                     | Bodwell v. Osgood .....            | 158                |
| Beardslee v. Beardslee .....       | 119                     | Bolton v. Harrod .....             | 522                |
| Beardslee v. French .....          | 731                     | Bond v. Aitkin .....               | 343                |
| Beardsley v. Davis .....           | 166                     | Bond v. Willett .....              | 103                |
| Beardsley v. Smith .....           | 695, 696                | Boon v. Bowers .....               | 632                |
| Beatty v. Kurtz .....              | 256, 257, 556, 562, 567 | Boone v. Eyre .....                | 358                |
| Beaumont v. Reeve .....            | 287                     | Boorman v. Jenkins .....           | 137, 166, 167      |
| Beck v. Burdett .....              | 207                     | Booth v. Starr .....               | 553                |
| Becker v. Dupree .....             | 686, 688                | Borrekins v. Bevan .....           | 167                |
| Beebe v. Robert .....              | 137, 166                | Bort v. Smith .....                | 116                |
| Beebee v. Bull .....               | 152                     | Boson v. Sanford .....             | 539, 541, 542, 543 |
| Beekman v. Lansing .....           | 104                     | Boston v. Lecard .....             | 561                |
| Beekman v. Saratoga etc. R. R. Co. | 42, 44, 659             | Boston Mill Co. v. Bulfinch .....  | 67                 |
| Beeson v. Beeson .....             | 321                     | Bowen v. Newell .....              | 197                |
| Beirne v. Dord .....               | 137                     | Bowen v. Shapcott .....            | 533                |
| Beitz v. Fuller .....              | 405                     | Bowers v. Oyster .....             | 292                |
| Belcher v. Hartford Bank .....     | 720                     | Bowers v. Suffolk Mfg Co. ....     | 566                |
| Belden v. Davies .....             | 264                     | Boyce v. Kalbaugh .....            | 561, 565           |
| Belknap v. Gleason .....           | 727                     | Boyce's Ex'r v. Grundy .....       | 717                |
| Bell v. Armstrong .....            | 214                     | Boyd v. Ladson .....               | 279                |
| Bell v. Layman .....               | 720                     | Boynton v. Page .....              | 119                |
| Bell v. Midland etc. R. W. Co. }   | 487, 689                | Bracket v. McNair .....            | 262                |
| Bell v. Perkins .....              | 522                     | Braddee v. Brownfield .....        | 294                |
| Bell v. Reed .....                 | 518                     | Braden v. Louisiana State Ins. Co. | 131                |
| Benedict v. Benedict .....         | 676                     | Bradford v. Manly .....            | 137, 166           |
| Benedict v. Field .....            | 191                     | Bradford v. Rouston .....          | 287                |
| Bennet v. Holt .....               | 348                     | Bradley v. Heath .....             | 158                |
| Bennet v. Henderson .....          | 390                     | Bradshaw v. Newman .....           | 141                |
| Bentley v. Donnelly .....          | 148                     | Brady v. Kelly .....               | 634                |
| Bentley v. Morse .....             | 287                     | Brady v. Mayor etc. of N. Y. ...   | 157                |
|                                    |                         | Branch Bank v. Boykin .....        | 289                |
|                                    |                         | Brandt v. Bowlby .....             | 262                |
|                                    |                         | Brant v. Scott .....               | 248                |

|   | PAGE                 |   | PAGE                           |
|---|----------------------|---|--------------------------------|
| Breakenridge v. Duncan .....                  | 607                  | Burch v. Sharland.....                            | 288                            |
| Brent v. Ervin.....                           | 128                  | Burdell v. Bardell.....                           | 80                             |
| Bretherton v. Wood.....                       | { 540, 541, 542, 543 | Burgin v. Patton.....                             | 248                            |
| Brewer v. New Gloucester.....                 | 694                  | Burhardt v. Sanford.....                          | 103                            |
| Bridge v. Ford.....                           | 145, 147             | Burley's case.....                                | 748                            |
| Bridge v. Gray.....                           | 581                  | Burnes v. Simpson.....                            | 148                            |
| Bridge v. Johnson.....                        | 633                  | Burr v. Burr.....                                 | 80                             |
| Bridges v. Wyckoff.....                       | 568, 569             | Burrows v. Carnes' Adm'r.....                     | 612                            |
| Bridgewater v. Gordon.....                    | 531                  | Burtch v. Nickerson.....                          | 272                            |
| Briel v. Natches.....                         | { 564, 566, 567, 569 | Burton, <i>Ex parte</i> .....                     | 288                            |
| Briggs v. Partridge.....                      | 344, 345             | Burwell v. Jackson.....                           | 94                             |
| Briggs v. Smith.....                          | 152                  | Bush v. Prosser.....                              | 174                            |
| Bright v. Eynon.....                          | 584                  | Bushell v. Scott.....                             | 560                            |
| Brisco v. Brisco.....                         | 79                   | Butler v. Duncomb.....                            | 632                            |
| Briscoe v. McElween.....                      | 689                  | Butler v. Maynard.....                            | 103, 104, 277                  |
| Bristol v. Dann.....                          | 124                  | Butler v. Meroer.....                             | 687                            |
| Bristol v. Sniffen.....                       | 129                  | Butler v. Van Wyck.....                           | 638                            |
| Bristow v. Wright.....                        | 544                  | Byram v. McGuire.....                             | 687, 688                       |
| Brix v. Broham.....                           | 288                  | Cable v. Cooper.....                              | 50                             |
| Brooker v. Coffin.....                        | 272                  | Calhoun v. Cook.....                              | 358                            |
| Brooklyn Bank v. De Grauw.....                | 177                  | Cambridge Inst. v. Littlefield.....               | 289                            |
| Brooklyn v. North Thirteenth Street R. R..... | 568                  | Cameron v. Mason.....                             | 254                            |
| Brooks v. Adams.....                          | 698                  | Camidge v. Allenby.....                           | 191                            |
| Broom v. Preston.....                         | 69                   | Camp v. Camp.....                                 | 466                            |
| Brosius v. Reuter.....                        | 270                  | Camp v. Chamberlain.....                          | 104                            |
| Broughton v. Birchmoore.....                  | 524                  | Campbell's case.....                              | 707                            |
| Brown, Matter of.....                         | 196, 197             | Campbell v. Armstrong.....                        | 496                            |
| Brown v. Adair.....                           | 651                  | Campbell v. Poultney.....                         | 62                             |
| Brown v. Allen.....                           | 686                  | Campbell v. State.....                            | 480                            |
| Brown v. Benight.....                         | 534                  | Campbell v. Taul.....                             | 508, 513                       |
| Brown v. Boyd.....                            | 370                  | Campbell v. Wittingham.....                       | 550                            |
| Brown v. Caldwell.....                        | 121                  | Campden v. Morton.....                            | 69                             |
| Brown v. Collier.....                         | 289                  | Canaler v. Fite.....                              | 229                            |
| Brown v. Commonwealth.....                    | 60, 61               | Carpenter v. Barber.....                          | 686                            |
| Brown v. Dysinger.....                        | 310                  | Carpenter v. Thompson.....                        | 466                            |
| Brown v. Hedges.....                          | 570                  | Carpenteria School District v. Heath.....         | 562, 565, 567                  |
| Brown v. Kyle.....                            | 229                  | Carpentier v. Willet.....                         | 110                            |
| Brown v. Nickle.....                          | 348                  | Carr v. Wallace.....                              | 355                            |
| Brown v. Quilter.....                         | 69                   | Carrier v. Dilworth.....                          | 327                            |
| Brown v. Rickets.....                         | 258, 717             | Carroll v. Bosley.....                            | 462                            |
| Brown v. Swineford.....                       | 688                  | Carroll v. Carroll.....                           | 633                            |
| Brown v. Vermuden.....                        | 257                  | Carson v. Clarke.....                             | 581                            |
| Browne v. Philadelphia Bank.....              | 522                  | Carter v. City of Portland.....                   | { 561, 563, 564, 566, 567, 568 |
| Brownfield v. Braddee.....                    | 294                  | Carter v. Graves.....                             | 518                            |
| Bruce v. Davenport.....                       | 90                   | Carter v. Koezley.....                            | 149                            |
| Bryant v. McCandless.....                     | 256, 567             | Cary v. Bancroft.....                             | 131                            |
| Buck v. Waterbury.....                        | 116                  | Case v. Heffner.....                              | 142                            |
| Buckbee v. Brown.....                         | 99                   | Cassell v. Cook.....                              | 445                            |
| Buckhurst's case.....                         | 233                  | Cassidy v. Begoden.....                           | 166                            |
| Buckmaster v. Harrop.....                     | 745                  | Castleberry v. Pierce.....                        | 445                            |
| Buddington v. Bradley.....                    | 421                  | Cecil, Matter of.....                             | 62                             |
| Buddle v. Wilson.....                         | 542, 543             | Chamberlayne v. Dummer.....                       | 711                            |
| Buffington v. Gerrish.....                    | 90                   | Champion v. Vincent.....                          | 688                            |
| Buffum v. Green.....                          | 207                  | Chapman v. Chapman.....                           | 355, 487                       |
| Bulkley v. Stewart.....                       | 489                  | Chapman v. Dyett.....                             | 699                            |
| Bull v. Griswold.....                         | 689                  | Chapman v. Lipscombe.....                         | 506                            |
| Bull v. Hopkins.....                          | 151                  | Charles Miller's case.....                        | 375                            |
| Bull v. Steward.....                          | 148                  | Charles River Bridge Co. v. Warren Bridge Co..... | 42                             |
| Bullen v. Burrel.....                         | 315                  | Chase's case.....                                 | 335, 348                       |
| Ballis v. Montgomery.....                     | 115                  |   |                                |
| Bunnell v. Read.....                          | 721                  |   |                                |

|  | PAGE          |                                       | PAGE          |
|--|---------------|---------------------------------------|---------------|
| Chaudron v. Hunt.....                          | 128           | Coles v. Trecothick.....              | 745           |
| Chaworth v. Beech.....                         | 594           | Colgrove v. Harlem etc. R. R. Co..... | 99            |
| Cheeseborough v. Millard.....                  | 307           | Collard's Adm'r v. Tuttle.....        | 562, 727      |
| Cheesman v. Thorne.....                        | 224, 225      | Collins v. Westbury.....              | 301           |
| Cheeves v. Bell.....                           | 248           | Collingsworth v. Horn.....            | 103, 528      |
| Chester v. Chester.....                        | 369           | Colt v. McMechen.....                 | 517           |
| Chicago etc. R. R. Co. v. Baker..              | 686           | Colt v. Woollaston.....               | 583           |
| Chicago and Rock Island R. R. Co. v. Ward..... | 768           | Colton v. Ross.....                   | 90            |
| Child v. Chappell.....                         | 84            | Coltrane v. McCaine.....              | 126           |
| Child v. Comker.....                           | 745           | Colvin v. Trader.....                 | 216           |
| Child v. Hudson Bay Co.....                    | 34, 37        | Commonwealth v. Alberger.....         | 569           |
| Child v. Morley.....                           | 389           | Commonwealth v. Clap.....             | 272           |
| Chipman v. Hartford.....                       | 721           | Commonwealth v. Cummings.....         | 472           |
| Christian v. Scott.....                        | 229           | Commonwealth v. Dascom.....           | 477           |
| Christianberry v. Christianberry               | 80            | Commonwealth v. Easland.....          | 379           |
| Christophers v. Sparke.....                    | 728           | Commonwealth v. Gordon.....           | 380           |
| Christy, <i>Ex parte</i> .....                 | 632           | Commonwealth v. Jailer.....           | 379           |
| Church of the Advent v. Farrow                 | 745           | Commonwealth v. Jefferson.....        | 472, 474      |
| Cincinnati v. Hamilton Co.....                 | 256           | Commonwealth v. Judd.....             | 376           |
| Cincinnati v. White.. { 81, 256, 561           |               | Commonwealth v. Kelly.....            | 566           |
|  | 567, 568      | Commonwealth v. Manson.....           | 379           |
| City of Baltimore v. Hughes' Adm'r.....        | 98            | Commonwealth v. McDonald.....         | 569           |
| City of Columbus v. Dahm.....                  | 563           | Commonwealth v. McGowan.....          | 727           |
| City of Des Moines v. Hall { 560, 567          |               | Commonwealth v. McKisson.....         | 376           |
|  | 568, 569      | Commonwealth v. Molts.....            | 355           |
| City of Jacksonville v. J. R. W. Co.....       | 84            | Commonwealth v. Murphy.....           | 378           |
| City of London v. Vanacre.....                 | 37            | Commonwealth v. Patterson.....        | 380           |
| City of Morrison v. Hinkson.....               | 569           | Commonwealth v. Perry.....            | 287           |
| City of Utica v. Churchill.....                | 75            | Commonwealth v. Reid.....             | 378, 379, 380 |
| Clark v. Bates.....                            | 689           | Commonwealth v. Robinson.....         | 379           |
| Clark v. Brooks.....                           | 116           | Commonwealth v. Sanford.....          | 473           |
| Clark v. City of Elizabeth.....                | 568           | Commonwealth v. Scott.....            | 479           |
| Clark v. Clark.....                            | 525           | Commonwealth v. Sparks.....           | 380           |
| Clark v. Mayor etc. of Syracuse                | 99            | Commonwealth v. Strembach.....        | 103, 275      |
| Clark v. Munsell.....                          | 174           | Commonwealth v. Thompson.....         | 472           |
| Clark v. Troy.....                             | 632           | Commonwealth v. Woelper.....          | 41, 63        |
| Clarke v. Sawyer.....                          | 75            | Company of Feltnakers v. Davis.....   | 37            |
| Clarkson v. Hannay.....                        | 458           | Comstock v. Smith.....                | 553           |
| Clayton v. Blakey.....                         | 340           | Conahan v. Smith.....                 | 142           |
| Clerk v. Day.....                              | 749           | Congregational Soc. v. Perry.....     | 696           |
| Clerk v. Wright.....                           | 738           | Conway v. Jett.....                   | 104           |
| Clermont v. Robb.....                          | 259           | Cook v. Bradley.....                  | 287           |
| Cleveland v. Rogers.....                       | 143, 145, 146 | Cook v. Garza.....                    | 687, 689      |
| Clevenger v. Dunaway.....                      | 689           | Cook v. Harris.....                   | 562, 564, 566 |
| Clinan v. Cooke.....                           | 745           | Cook v. Shearman.....                 | 289           |
| Clopper v. Union Bank.....                     | 192, 641      | Cook v. Stearns.....                  | 678           |
| Cloud v. Hamilton.....                         | 496           | Cooley v. Deway.....                  | 537           |
| Clute v. Robinson.....                         | 438           | Coolidge v. Brigham.....              | 137           |
| Coalter v. Hunter.....                         | 318           | Coope v. Eyre.....                    | 619           |
| Coates' appeal.....                            | 367           | Cooper v. Alden.....                  | 99            |
| Cochrane v. Tuttle.....                        | 686           | Cooper v. Barber.....                 | 174           |
| Cockburn v. Thompson.....                      | 224           | Cooper v. Rankin.....                 | 344           |
| Cocke v. McGinnis.....                         | 497, 499, 502 | Cooper v. Smith.....                  | 316           |
| Coggs v. Bernard.....                          | 541, 543      | Cooper v. Williams.....               | 318           |
| Cogens v. Virginia.....                        | 632, 633      | Cope v. Marshall.....                 | 729           |
| Coite v. Society for Savings.....              | 75            | Corbet v. Bank of Smyrna.....         | 188           |
| Cole v. Potts.....                             | 745           | Core v. Spencer.....                  | 214           |
| Cole v. Tucker.....                            | 685, 687, 688 | Coriton v. Hellier.....               | 592           |
| Coleman v. Henderson.....                      | 119, 667      | Corlies v. Standridge.....            | 277           |
| Coleman v. Hutchenson.....                     | 338           | Corliss v. Shepherd.....              | 288           |
| Coleman v. McMurdo.....                        | 671, 673      | Cornelius v. Commonwealth.....        | 379           |
|  |               | Cornell v. Barnes.....                | 144, 145, 147 |
|  |               | Corning v. White.....                 | 207           |



|                                  | PAGE                    |                                  | PAGE          |
|----------------------------------|-------------------------|----------------------------------|---------------|
| Cornwall v. Haight .....         | 167                     | Davy v. Allen .....              | 705           |
| Corprew v. Boyle .....           | 612                     | Dowes v. Peck .....              | 134           |
| Coryell v. Colbaugh .....        | 689                     | Day v. Munson .....              | 632           |
| Costelo v. Cave .....            | 451                     | Day v. Woodworth .....           | 685, 689      |
| Couch v. Ash .....               | 284                     | Dayrell v. Champness .....       | 225           |
| "Count Joannes" v. Bennett ..... | 129                     | Dayton v. Rutland .....          | 565           |
| County v. Newport .....          | 569                     | Dean v. Mason .....              | 266           |
| Cource v. Prince .....           | 445                     | Dearborn v. Bowman .....         | 287           |
| Courcier v. Graham .....         | 259                     | Dearth v. Williamson .....       | 94            |
| Covenhoven v. Shuler .....       | 429, 607                | Deaver v. Savage .....           | 207           |
| Cowan v. Buyers .....            | 571                     | De Berenger's case .....         | 373           |
| Cox v. Louisville R. R. Co. .... | 560                     | Dech's appeal .....              | 355           |
| Coxe v. State Bank .....         | 307                     | Deering v. The Earl of Winchel-  |               |
| Craig v. Childress .....         | 516, 517                | sea .....                        | 610           |
| Crandall v. Gallup .....         | 713                     | De Haro v. United States .....   | 681           |
| Craik v. Craik .....             | 148                     | Deihl v. King .....              | 763           |
| Crake v. Crake .....             | 149                     | Delamater's Estate .....         | 301           |
| Craker v. Chicago etc. R. W. Co. | 685                     | Delaware and Hudson Can. Co.'s   |               |
| Crane v. Conklin .....           | 75, 458                 | appeal .....                     | 307           |
| Crane v. King .....              | 533                     | Den v. Barnes .....              | 248, 763      |
| Crary v. Sprague .....           | 115, 116, 152           | Den v. Hardenbergh .....         | 514           |
| Crawley v. Timberlake .....      | 254                     | Den v. Webb .....                | 338           |
| Craythorne v. Swinburne .....    | 608, 610, 611, 612, 716 | Denby's case .....               | 376           |
| Creager v. Brengle .....         | 720                     | Deuman v. Prince .....           | 84            |
| Crenshaw v. State .....          | 642                     | Denn v. Gaakin .....             | { 595, 597    |
| Cresson v. Stout .....           | 103, 277, 528           | { 603, 604                       |               |
| Cronk v. Trumble .....           | 745                     | Dennis v. Rowls .....            | 144           |
| Cropsey v. McKinney .....        | 87                      | Denver v. Clements .....         | { 560, 564    |
| Cross v. Peters .....            | 90                      | { 566, 568                       |               |
| Crowell v. Maughs .....          | 122                     | Depuly v. Swart .....            | 289           |
| Cruger v. Armstrong .....        | 197                     | Derby v. Alling .....            | 564, 566      |
| Cummings v. Morris .....         | 152                     | Des Arts v. Leggett .....        | 129, 177      |
| Cummins v. Kennedy .....         | 553                     | De Sobry v. De Laistre .....     | 141           |
| Cundell v. Dawson .....          | 266                     | Despatch Line v. Bellaney W. Co. | 344           |
| Cuppy v. Hixon .....             | 745                     | Detrick v. Migatt .....          | 225           |
| Curran v. Crawford .....         | 278                     | Detroit v. Detroit and Milwaukee |               |
| Curry v. Com. Ins. Co. ....      | 676                     | R. R. Co. ....                   | 560           |
| Curtis v. Fox .....              | 75                      | Devoughn v. Heath .....          | 689           |
| Curtiss v. Hoyt .....            | 689                     | Dewey v. Gray .....              | 634           |
| Cutler v. Crawford .....         | 326                     | Dewitt v. Post .....             | 271           |
| Cutten v. Smith .....            | 685, 687, 689           | Dey v. Dox .....                 | 627           |
| Cuyler v. McCartney .....        | 115                     | Dibble v. Morris .....           | 689           |
|                                  |                         | Dibble v. Rogers .....           | 122           |
|                                  |                         | Dickenson v. Sewart .....        | 214           |
| Dacosta v. Lanscrit .....        | 548                     | Dickins v. Jones .....           | 489           |
| Daggett v. Shaw .....            | 263, 517                | Dickon v. Clifton .....          | 541, 542      |
| Dakin v. Hudson .....            | 145, 147                | Diedrich v. N. W. U. Ry. Co.     | 568, 569      |
| Daley v. Perry .....             | 528                     | Dikeman v. Parrish .....         | 337           |
| Dan v. Brown .....               | 406                     | Dixon v. Sinclair .....          | 581           |
| Dana v. Fredler .....            | 166                     | Doak v. Donelson .....           | 466           |
| Daniels v. Chicago & N. W. R.    |                         | Dodge v. Adams .....             | 287           |
| R. Co. ....                      | 564                     | Dodge v. Gaylord .....           | 634, 635      |
| Danville B. Co. v. Pomroy .....  | 359                     | Doe v. Baker .....               | 681           |
| Darry v. People .....            | 203                     | Doe v. Huddart .....             | 223           |
| Dartmouth College v. Wood-       |                         | Doe v. Parunter .....            | 144, 147      |
| ward .....                       | 43, 705                 | Doe v. Seaton .....              | 223           |
| Davenport v. Hanbury .....       | 247                     | Doe v. Tyler .....               | 223           |
| Davidson v. Dallas .....         | 634                     | Doe d. Bowerman v. Sybourn ..    | 702           |
| Davis v. Dyer .....              | 505                     | Doe d. Gregory v. Whichelo ..    | 750           |
| Davis v. Hooper .....            | 266                     | Doe d. Rigge v. Bell .....       | 340           |
| Davis v. Howard .....            | 122                     | Doe d. Hallen v. Ironmonger ..   | 245           |
| Davis v. Hunt .....              | 396                     | Dongal v. Wilson .....           | 317           |
| Davis v. Newman .....            | 250                     | Donnell v. Thompson .....        | 237, 553, 581 |
| Davis v. Williams .....          | 506                     | Donner v. Palmer .....           | 634           |

|   | PAGE          |   | PAGE          |
|---|---------------|---|---------------|
| Donohue v. People.....                      | 203           | Ellmaker v. F. F. Ins. Co.....                            | 327           |
| Donovan v. Finn.....                        | 459           | Ellsworth v. Potter.....                                  | 689           |
| Dorr v. Munsell.....                        | 264           | Elmendorf v. Taylor.....                                  | 716, 717      |
| Dorsey v. Manlove.....                      | 688           | Elwood v. Deifendorf.....                                 | 152           |
| Dougherty v. Jack.....                      | 301           | Emblen v. Myers.....                                      | 687, 689      |
| Doupe v. Genin.....                         | 72            | Emerson v. Atwater.....                                   | 632           |
| Dover v. Fox.....                           | 563           | Emerson v. Fish.....                                      | 681           |
| Dowle, Matter of.....                       | 391           | Emery v. Hersey.....                                      | 323           |
| Downer v. St. Paul etc. R. R.<br>Co.....    | 560, 562, 563 | Enders v. Sternbergh.....                                 | 129           |
| Downin v. Sprecher.....                     | 225           | Enfield Toll Bridge Co. v. Con-<br>necticut River Co..... | 44, 704, 712  |
| Downing v. Funk.....                        | 353           | Erickson v. Smith.....                                    | 110           |
| Downing v. Rugar.....                       | 126           | Erwin's appeal.....                                       | 295           |
| Draggou v. Graham.....                      | 145, 149      | Erwin v. Oldham.....                                      | 459           |
| Drake v. Mitchell.....                      | 406           | Erwin v. Saunders.....                                    | 288           |
| Drayton v. Wells.....                       | 116, 376      | Esmon v. State.....                                       | 480           |
| Drinkwater v. Falconer.....                 | 362           | Estes v. Antrobus.....                                    | 638, 767      |
| Du Belloix v. Lord Waterpark.....           | 725           | Etheridge v. Corpseur.....                                | 223           |
| Dubuque v. Maloney.....                     | 567, 568      | Etting v. U. S. Bank.....                                 | 633           |
| Duchess of Kingston's case.....             | 223, 225      | Evans v. Birch.....                                       | 624           |
| Duestoe's case.....                         | 411           | Evans v. King.....  | 533           |
| Duff v. Fisher.....                         | 633           | Evans v. Mengel.....                                      | 301           |
| Duffield v. Creed.....                      | 725           | Everett v. Vendryes.....                                  | 142           |
| Duffield v. Wallace.....                    | 312           | Ewart v. Street.....                                      | 517, 518      |
| Duke v. Harper.....                         | 466           | Ewell v. State.....                                       | 488           |
| Duke of Suffolk's case.....                 | 536           | Ewing v. Cantrell.....                                    | 459           |
| Dummer v. Jersey City.....                  | 563           | Exall v. Partridge.....                                   | 388           |
| Duncan v. Bloomstock.....                   | 307           |   |               |
| Duncan v. Lyon.....                         | 443, 445      | Fairbrother v. Shaw.....                                  | 745           |
| Duncan v. Martin.....                       | 525           | Fairfield v. Morey.....                                   | 562           |
| Dunlap v. Thompson.....                     | 507           | Fairfield etc. Co. v. Thorp.....                          | 695           |
| Dunlap v. Commonwealth.....                 | 616           | Farmers v. Flint.....                                     | 288           |
| Dunseith v. Wade.....                       | 261           | Farmers' Loan etc. Co. v. May-<br>or.....                 | 75            |
| Dupre v. Rein.....                          | 87            | Farr v. Simms.....  | 116           |
| Durand v. Isaacks.....                      | 438           | Farr v. Smith.....  | 574           |
| Durant v. Durant.....                       | 78            | Farwell v. Warren.....                                    | 686           |
| Dureley v. Hardinge.....                    | 225           | Faulkner v. Davis.....                                    | 224           |
| Dustin v. Newcomer.....                     | 259           | Feemster v. Markham.....                                  | 489, 641      |
| Duval's Heirs v. McCloskey.....             | 727           | Fellows v. Lord Greenville.....                           | 572           |
| Duval v. Waters.....                        | 522           | Ferguson v. Fisk.....                                     | 721           |
| Dwight v. Brewster.....                     | 517           | Ferguson v. Hamilton.....                                 | 137           |
| Dyer v. Denham.....                         | 686           | Ferguson v. Kennedy.....                                  | 401           |
| Dykers v. Townsend.....                     | 137           | Fermor's case.....  | 584           |
| Dyson v. Collick.....                       | 729, 731      | Ferris, Matter of application of.....                     | 204           |
|   |               | Ferriss v. Ferriss.....                                   | 722           |
| Eager v. Atlas Ins. Co.....                 | 166, 518      | Field's case.....   | 282, 283, 286 |
| Earl of Ferrers' case.....                  | 411           | Filbert v. Hawk.....                                      | 307           |
| East Tennessee etc. R. R. v.<br>Nelson..... | 518           | Filby v. Miller.....                                      | 294           |
| Eastwood v. Kenyon.....                     | 287           | Finch v. Finch.....                                       | 224, 225      |
| Eaton v. Whittaker.....                     | 745           | Finney v. State.....                                      | 281           |
| Eberle v. Mayer.....                        | 275           | Finucane v. Gayfere.....                                  | 214           |
| Edelen v. Hardy's Lessee.....               | 487           | Finucane v. Kearney.....                                  | 745           |
| Edmunds v. Digges.....                      | 189           | Fireman's Ins. Co. v. Ely.....                            | 37            |
| Edwards v. Edwards.....                     | 223, 313      | First Bap. Church v. Utica etc.<br>R. R. Co.....          | 119           |
| Edwards v. Handley.....                     | 301           | First Bap. Soc. v. Rapalee.....                           | 110           |
| Edwards v. McKee.....                       | 128           | First Mass. T. Corp. v. Field.....                        | 503           |
| Edwards v. Smith.....                       | 390           | Fisher v. Prosser.....                                    | 464           |
| Egberts v. Wood.....                        | 721           | Fisher's Ex'r v. Mossman.....                             | 727           |
| Ehle v. Judson.....                         | 287           | Fisk v. Havana.....                                       | 560, 562, 565 |
| Eichelberger v. Finley.....                 | 197           | Fitzgerald v. People.....                                 | 203           |
| Elijah v. State.....                        | 488           | Fleet v. Hollenkamp.....                                  | 688           |
| Elkins v. Boston etc. R. R.....             | 137           | Fleming v. Hayne.....                                     | 289           |
| Elliott v. Rossell.....                     | 261, 517      |   |               |

|  | PAGE |                                     | PAGE |
|--|------|-------------------------------------|------|
| Fleming v. Slocumb.....                      | 586  | Gary v. May.....                    | 726  |
| Fletcher v. Lord Sondes.....                 | 632  | Gash v. Johnson.....                | 223  |
| Fletcher v. Peck.....                        | 704  | Gaskell v. Gaskell.....             | 225  |
| Fogg v. Rogers.....                          | 496  | Gates v. Green.....                 | 71   |
| Fogg v. Sawyer.....188,                      | 191  | Gates v. Salmon.....                | 634  |
| Fonereau v. —.....                           | 480  | Gayle v. Suydam.....                | 177  |
| Foot v. New Haven etc. Co.....               | 681  | Gee, <i>Ex parte</i> .....          | 715  |
| Foot v. Colvin.....                          | 313  | Geiser v. Kerahner.....             | 579  |
| Ford v. Fleming.....                         | 361  | Gentleman v. Soule.....             | 560  |
| Ford v. Travis.....                          | 760  | German v. Gabbald.....291, 309,     | 311  |
| Forney v. Hallecher.....                     | 483  | Geyer v. Wentzel.....               | 370  |
| Forrest v. Forrest.....                      | 116  | Giblin v. Jordan.....               | 632  |
| Forster v. Forster.....                      | 97   | Gifford v. Hort.....224,            | 225  |
| Forster v. Sierra.....                       | 243  | Gil v. Cubit.....                   | 331  |
| Forsyth v. Gannon.....                       | 390  | Gilbert v. Dickerson.....574,       | 721  |
| Forsythe v. Norcross.....                    | 327  | Gilbert v. Hoffman.....             | 116  |
| Fortune v. Newson.....                       | 731  | Gillaspie v. Osburn.....            | 337  |
| Forward v. Deetz.....                        | 337  | Gillingham v. Dempsey.....          | 262  |
| Forward v. Pillard.....                      | 516  | Gills v. Martin.....                | 441  |
| Foster v. Cook.....                          | 446  | Gilman v. Lowell.....173,           | 174  |
| Foster v. People.....                        | 204  | Gilman v. Peck.....                 | 188  |
| Foster v. Shaw.....                          | 289  | Gilmore v. Wilbur.....              | 681  |
| Fowler v. Ravens.....                        | 466  | Gist v. Lybrand.....                | 508  |
| Fowles v. Bowen.....                         | 158  | Givens v. Calder.....738,           | 745  |
| Fox v. Clark.....                            | 206  | Gladden v. State.....               | 152  |
| Fox v. Hamby.....                            | 570  | Glass v. Beach.....                 | 287  |
| Fox v. Heffner.....                          | 312  | Glass v. Hurlburt.....              | 745  |
| Fox v. Hoyt.....                             | 700  | Glenn v. Smith.....192,             | 641  |
| Foxcroft v. Lister.....                      | 735  | Glenn v. Wallace.....               | 613  |
| Frame v. Dawson.....                         | 745  | Glidden v. Strupler.....            | 355  |
| Frame v. Kenny.....502,                      | 727  | Godfrey v. City of Allison.....     | 562  |
| Francois v. Maloney.....                     | 122  | Godfrey v. City of Alton.....       | 563  |
| Franklin v. Talmadge.....                    | 533  | Goff v. Clinkard.....               | 261  |
| Franklin Bank, Matter of.....                | 197  | Gogel v. Jacoby.....                | 327  |
| Franklin Coal Co. v. McMullan.....           | 689  | Goggeshall v. Pelton.....           | 569  |
| Frazier v. Tubb.....                         | 489  | Golding v. Williams.....            | 689  |
| Freeman v. Freeman.....                      | 224  | Goodess v. Williams.....224,        | 225  |
| French v. Davies.....                        | 446  | Goodspeed v. East Haddam Bank.....  | 688  |
| French v. McIlhenny.....                     | 600  | Goodtitle v. Otway.....             | 632  |
| French v. Pearce.....121,                    | 401  | Gordon v. Buchanan.....516,         | 518  |
| Friedman v. Mathee.....                      | 489  | Gordon v. Bulkeley.....             | 344  |
| Frieze v. Glenn.....                         | 745  | Gordon v. Goodwin.....              | 720  |
| Frontier Bank v. Morse.....188,              | 191  | Gordon v. Little.....               | 518  |
| Fuller v. Allen.....                         | 103  | Gordon v. Preston.....              | 304  |
| Fuller v. Hampton.....                       | 694  | Gorgetat v. McCarty.....            | 522  |
| Fuller v. State.....                         | 202  | Gouglemann v. People.....           | 203  |
| Fullerton v. Warrick.....                    | 494  | Gould v. Banks.....                 | 178  |
| Fulton v. Mehrenfeld.....                    | 560  | Gould v. Gould.....                 | 87   |
| Fulton v. Stuart.....84,                     | 553  | Govett v. Radnidge.....541, 542,    | 543  |
|  |      | Gowan v. Philadelphia Exchange..... | 559  |
| Gallagher v. Waring.....                     | 135  | Graham v. Hunt.....                 | 289  |
| Gallego's Exr's v. Attorney-general.....250, | 363  | Graham v. Merrill.....              | 459  |
| Gangwer v. Fry.....                          | 745  | Gram v. Seton.....                  | 343  |
| Gardiner M. Co. v. Heald.....                | 295  | Grandy v. Sawyer.....               | 248  |
| Gardner v. Barden.....                       | 152  | Graves v. Burdan.....               | 71   |
| Gardner v. Newburgh.....                     | 318  | Gray v. L. & S. Turnpike Co....     | 48   |
| Gardner v. Tisdale.....                      | 562  | Gray v. McCreary.....357,           | 358  |
| Garland v. Rives.....                        | 586  | Gray v. Roberts.....                | 267  |
| Garland v. Salem Bank.....                   | 745  | Grayson v. Atkinson.....            | 369  |
| Garland v. Wholeham.....                     | 687  | Grayson v. Bannon.....              | 343  |
| Garner v. Stubblefield.....                  | 745  | Greatorex v. Cary.....              | 447  |
| Garrison's appeal.....                       | 307  | Green v. Berthea.....               | 563  |
| Garrison v. Memphis Ins. Co....              | 518  | Green v. Canaan.....                | 561  |
|  |      | Green v. Johnson.....103, 277,      | 528  |

|  | PAGE               |                              | PAGE          |
|--|--------------------|------------------------------|---------------|
| Green v. Oakes.....                            | 258                | Harley v. Thornton.....      | 188           |
| Green v. Roberts.....                          | 327                | Harper's appeal.....         | 348           |
| Green v. Town of New Haven...                  | 565                | Harper v. Williams.....      | 253           |
| Greenby v. Wilcox.....                         | 236                | Harris v. Cook.....          | 586           |
| Greening v. Sheffield.....                     | 644                | Harris v. Elliot.....        | 569           |
| Greenville etc. R. R. Co. v. Part-<br>low..... | 689                | Harris v. Gillingham.....    | 681           |
| Greenwood v. Curtis.....                       | 141                | Harris v. Huntington.....    | 153           |
| Gregg v. James.....                            | 131                | Harris v. Philpot.....       | 248           |
| Gregory v. Setter.....                         | 309, 312           | Harris v. Purdy.....         | 637           |
| Gregory's Lessee v. Setter.....                | 291                | Harrison v. Close.....       | 579           |
| Greneley's case.....                           | 509, 513           | Harrison v. Jackson.....     | 344           |
| Griffith v. Frazier.....                       | 760, 762           | Harrison v. Maxwell.....     | 394           |
| Griffith v. Ingledew.....                      | 518                | Harrison v. North.....       | 79            |
| Groff v. Griswold.....                         | 148                | Harrison v. Ward.....        | 461           |
| Grogan v. Hayward.....                         | 568, 561           | Harrow v. Myers.....         | 634           |
| Grosvenor v. Austin.....                       | 258                | Hart v. Boller.....          | 192, 649      |
| Grover v. Wakeman.....                         | 207                | Hart v. Gregg.....           | 337           |
| Grube v. Nichols.....                          | 562                | Hart v. Mayor of Albany..... | 99            |
| Grube v. Wells.....                            | 562, 563           | Hart v. McKeen.....          | 90            |
| Grumon v. Raymond.....                         | 698                | Hart v. McLellan.....        | 745           |
| Grund v. Van Vleck.....                        | 688                | Hart v. Wright.....          | 137, 166      |
| Gulio v. Loder.....                            | 727                | Hart v. Harvey.....          | 110           |
| Gulick v. Ward.....                            | 267                | Hartzall v. Sill.....        | 318           |
| Gunter v. Astor.....                           | 684                | Harvey v. Harbach.....       | 358           |
| Guthrie v. New Haven.....                      | 564, 565           | Harvey v. Pike.....          | 518           |
| Guy Raines, case of.....                       | 202                | Harvey v. Smith.....         | 223           |
| Gwinn v. Rooker.....                           | 343                | Harwood v. Jones.....        | 745           |
|  |                    | Haskell v. Bailey.....       | 727           |
| Hager v. Tibbits.....                          | 174                | Haskins v. People.....       | 360           |
| Haggerty v. Wilber.....                        | 103, 104, 277, 528 | Hatch v. Benton.....         | 152           |
| Haines v. O'Connor.....                        | 312                | Hatch v. Dwight.....         | 314, 420      |
| Halcott v. Markant.....                        | 311                | Hatter v. Greenlee.....      | 301           |
| Hales v. Bercham.....                          | 745                | Hatton v. Robinson.....      | 335           |
| Hales' Lessee v. Vandergrift.....              | 748                | Haven v. Brown.....          | 295           |
| Hall v. Bartlett.....                          | 124                | Hawk v. Genseman.....        | 357           |
| Hall v. Benner.....                            | 466                | Hawkes v. Saunders.....      | 287           |
| Hall v. Howd.....                              | 699                | Hayden v. Demets.....        | 177           |
| Hall v. Shultz.....                            | 489                | Haydock v. Cope.....         | 206           |
| Hallett v. Hallett.....                        | 717                | Hayes v. Ward.....           | 720           |
| Hallett v. Wylie.....                          | 71, 72             | Haymaker v. Eberly.....      | 350           |
| Halliday v. Martinet.....                      | 522                | Haynes v. Seachrest.....     | 343           |
| Halstead v. Black.....                         | 149                | Hazard v. Irwin.....         | 264           |
| Ham v. Goodrich.....                           | 745                | Hazard v. Israel.....        | 689           |
| Hamilton v. Buckwater.....                     | 448                | Heard v. Wadham.....         | 324           |
| Hamilton v. Cutts.....                         | 553                | Heath v. Hubbard.....        | 571           |
| Hamilton v. Lycoming Ins. Co.....              | 353                | Heath v. Nutter.....         | 344           |
| Hamper, <i>Ex parte</i> .....                  | 620                | Heath v. Sansom.....         | 333           |
| Hanford v. McNair.....                         | 155, 344           | Heatherly v. Bridges.....    | 487           |
| Hanford v. Storie.....                         | 717                | Hefley v. Baker.....         | 687, 689      |
| Hanly v. Blackford.....                        | 116                | Heister v. Maderia.....      | 348           |
| Hannaball v. Spaulding.....                    | 475, 480           | Hellings v. Bird.....        | 465           |
| Hannibal v. Draper.....                        | 568                | Helvete v. Rapp.....         | 305           |
| Hanscom v. Tower.....                          | 148                | Henderson v. Burton.....     | 254           |
| Hansen v. Barnes' Lessee.....                  | 103, 277           | Henderson v. Lewis.....      | 131, 727      |
| Harbeck v. Craft.....                          | 196, 197           | Henderson v. McDuffee.....   | 612           |
| Hardin v. Cumstock.....                        | 153                | Hendricks v. Robinson.....   | 257, 287, 717 |
| Harding v. Hole.....                           | 562                | Henins v. Smith.....         | 563           |
| Harding v. Handy.....                          | 717                | Henry v. Ballard.....        | 221           |
| Harding v. Jasper.....                         | 560, 563, 568      | Henshaw v. Bryant.....       | 90            |
| Hardy v. Memphis.....                          | 566, 569           | Heppard v. Douglas.....      | 284           |
| Hargous v. Stone.....                          | 137                | Herbement v. Sharp.....      | 396           |
| Harker v. Bennett.....                         | 150                | Hersh v. Ringwalt.....       | 638, 767      |
| Harle v. McCoy.....                            | 119                | Hever's case.....            | 373           |
|  |                    | Heyer v. Burger.....         | 87            |

|                                 | PAGE          |                                      | PAGE          |
|---------------------------------|---------------|--------------------------------------|---------------|
| Hibblewhite v. McMorine .....   | 344           | Hunt v. Mansfield .....              | 721           |
| Hibernia T. Corp. v. Henderson. | 267           | Hunt v. Morris .....                 | 517, 518      |
| Hickman v. Caldwell .....       | 528           | Hunt v. Standart .....               | 142           |
| Hicks v. Brown. ....            | 139           | Hunter v. Hempstead .....            | 522           |
| Higgins v. Scott .....          | 726           | Hunter v. Parker .....               | 344           |
| Higginson v. Martin. ....       | 144           | Hunter v. Sandy Hill. 561, 562,      | 563           |
| Hihn v. Curtis .....            | 632, 633, 634 | Huntley v. Bacon .....               | 689           |
| Hill v. Epley .....             | 355           | Huston v. Williams .....             | 266           |
| Hill v. Martin .....            | 522           | Hutchins v. Johnson .....            | 699           |
| Hill v. Reesegieu .....         | 94            | Hutchins v. Olcutt .....             | 192           |
| Hills v. Miller .....           | 83            | Hutchinson v. Boggs .....            | 335           |
| Himmelman v. Dancs .....        | 148           | Hyatt v. Trustees of Rondout...      | 99            |
| Himmelman v. Hotaling. ....     | 196           | Hyde v. Cooper .....                 | 745           |
| Hinton v. Hinton .....          | 300           | Hyde v. Paige .....                  | 137           |
| Hoadley v. San Francisco. {     | 561, 568      | Hyde v. Stone .....                  | 574           |
|                                 | 569           | Hyde v. Wolf .....                   | 137           |
| Hobbs v. Crage .....            | 248           | Hylliard v. Nickols .....            | 475, 480      |
| Hodge v. Newton .....           | 269           |                                      |               |
| Hoff v. Baldwin .....           | 522           | Illinois Ins. Co. v. Littlefield ... | 562           |
| Hogan v. Jackson .....          | 368, 369      | Isley v. Jewett .....                | 288           |
| Hoke v. Herman .....            | 363           | Indianapolis etc. Railway Co. v.     |               |
| Holbrook v. Vibbard .....       | 142           | Tyng .....                           | 137           |
| Holdans v. Trustees of Cold     |               | Inglehart v. Thousand Island Ho-     |               |
| Spring .....                    | 562           | tel. ....                            | 137           |
| Holder v. Coats .....           | 731           | Ingraham v. Bockins .....            | 326           |
| Hollenbeck v. Van Valkenburgh   | 129           | Ingraham v. Hutchinson. ....         | 315, 316      |
| Holley v. Mix .....             | 627           | Inman v. Jenkins .....               | 265           |
| Holliday v. Cammell .....       | 570           | Irwin v. Shultz .....                | 327           |
| Hollister v. Hollister .....    | 149           | Ives v. Goddard .....                | 152           |
| Holloway v. Birtwhistle .....   | 394           |                                      |               |
| Holman v. Walden .....          | 533           | Jackman v. Ringland .....            | 313           |
| Holme v. Karoper. ....          | 333, 334      | Jackson v. Brownson .....            | 469           |
| Holmes v. Broughton .....       | 150, 581      | Jackson v. Burgott .....             | 586           |
| Holmes v. De Camp .....         | 192           | Jackson v. Cutright .....            | 745           |
| Holt v. Van Epps .....          | 688           | Jackson v. Davis .....               | 466, 487      |
| Homer v. Fish .....             | 503           | Jackson v. Dillon .....              | 485, 486      |
| Homer v. Savings Bank of New    |               | Jackson v. Dyalng .....              | 121           |
| Haven .....                     | 716           | Jackson v. French .....              | 466           |
| Hone v. Henriques .....         | 206           | Jackson v. Harder .....              | 665           |
| Hood v. Bowman .....            | 745           | Jackson v. Hartwell .....            | 569           |
| Hoole v. Attorney-general. .... | 560           | Jackson v. Hudson .....              | 665           |
| Hoose v. Sherrill .....         | 146           | Jackson v. King .....                | 458, 487, 586 |
| Hope d. Brown v. Taylor .....   | 369           | Jackson v. Le Grange .....           | 627           |
| Hopkyns v. Hopkyns .....        | 224           | Jackson v. Loomis .....              | 356           |
| Hoppin v. Buffum .....          | 62            | Jackson v. McGinnis .....            | 499           |
| Hornbeck v. Westbrook .....     | 569           | Jackson v. Miller .....              | 466           |
| Horton v. Miller .....          | 307           | Jackson v. Morse .....               | 313           |
| Hough v. Bailey .....           | 727           | Jackson v. Murray .....              | 343           |
| Houser v. Lamont .....          | 348           | Jackson v. Ramsay .....              | 235           |
| Howard v. Gage .....            | 269           | Jackson v. Rowland .....             | 466           |
| Howard v. Thompson .....        | 158           | Jackson v. Shauber .....             | 604           |
| Howell v. Alkyn .....           | 275           | Jackson v. Shepard .....             | 395           |
| Howell v. Van Sicklen .....     | 116           | Jackson v. Spear .....               | 118           |
| Howes v. Ball .....             | 680           | Jackson v. Staats .....              | 763           |
| Hoy v. Sterrett .....           | 318           | Jackson v. Whitbeck .....            | 338           |
| Jubbard v. Martin .....         | 489           | Jackson d. Hull v. Babcock .....     | 680           |
| Juber v. Gazley .....           | 568           | Jackson d. Sackett v. Sackett {      | 725           |
| Jubert v. Williams .....        | 284           |                                      | 728           |
| Anderson v. State .....         | 488           | Jacobs v. Bull .....                 | 461           |
| Jacobs v. Morris .....          | 745           | Jaffe v. Skae .....                  | 635           |
| Humphreys v. Humphreys .....    | 362           | Jamison v. Moon .....                | 685, 686      |
| Humphries v. Beckwell .....     | 197           | Jaques v. Weeks .....                | 348           |
| Humphries v. Johnson .....      | 687           | Jarvis v. Dean .....                 | 256           |
| Hunt v. Dutcher .....           | 149           | Jarvis v. Hatheway .....             | 157           |

|   | PAGE               |  | PAGE                    |
|---|--------------------|--|-------------------------|
| Jasper v. Purnell.....                        | 686, 689           | King v. Inhabitants of Woburn.....               | 695                     |
| Jeffcoat v. Knotts.....                       | 689                | King v. Kerr.....                                | 84, 237, 553            |
| Jeffreys v. Alston.....                       | 214                | King v. Merchant.....                            | 475                     |
| Jenkins v. Richardson.....                    | 131                | King v. Root.....                                | 158, 272                |
| Jennings, <i>Ex parte</i> .....               | 318                | Kingdon v. Nottle.....                           | 235, 236                |
| Jennings v. Maddox.....                       | 689                | Kip v. Bank of New York.....                     | 716                     |
| Jennings v. Throgmorton.....                  | 266                | Kip v. Norton.....                               | 122                     |
| Jerry v. State.....                           | 202                | Kisler v. Kisler.....                            | 313                     |
| Jersey City v. City.....                      | 569                | Kittle v. Pfeiffer.....                          | 258                     |
| Jersey City v. Morris Canal and<br>B. Co..... | 569                | Kneeland v. Milwaukee.....                       | 632, 634                |
| Jewell v. Schroepfel.....                     | 324                | Knight v. Jordan.....                            | 502, 503                |
| Jewett v. Jewett.....                         | 669                | Knight v. Pugh.....                              | 335                     |
| Johns v. Battin.....                          | 343                | Knouff v. Thompson.....                          | 355                     |
| Johnson v. Ball.....                          | 527, 528           | Kolb v. Bankhead.....                            | 687                     |
| Johnson v. Camp.....                          | 686, 688           | Koop v. Handy.....                               | 166                     |
| Johnson v. Cooper.....                        | 502                | Kountz v. Brown.....                             | 687                     |
| Johnson v. Ellison.....                       | 534                | Kramer v. Arthurs.....                           | 294                     |
| Johnson v. Friar.....                         | 516, 518           | Kuhns v. G. N. Bank.....                         | 334, 335                |
| Johnson v. Johnson.....                       | 487                | Kunkle v. Wolfersberger.....                     | 348                     |
| Johnson v. Lusk.....                          | 514                | Kyle v. Logan.....                               | 560, 561, 562, 564, 565 |
| Johnson v. Weed.....                          | 186, 192           | Kymer v. Suwercropp.....                         | 133                     |
| Johnston v. Glancy.....                       | 745                | Labbe's Heirs v. Abat.....                       | 87                      |
| Jones v. Aetna Ins. Co.....                   | 137                | Lacey v. Tomlinson.....                          | 709                     |
| Jones v. Collier.....                         | 446                | Lacon v. Mertins.....                            | 745                     |
| Jones v. Collins.....                         | 75                 | Lacy v. Garrard.....                             | 263                     |
| Jones v. Jones.....                           | 103, 277, 528, 719 | Ladd v. Hill.....                                | 572                     |
| Jones v. Morgan.....                          | 241                | Lade v. Sheperd.....                             | 256, 559                |
| Jones v. Peterman.....                        | 745                | La Farge v. Rickert.....                         | 178                     |
| Jones v. Pitcher.....                         | 517, 518, 721      | La Frombois v. Jackson.....                      | 401                     |
| Jones v. Quinnipack Bank.....                 | 720                | Lalla Bunsedhur v. The Bengal<br>Government..... | 612                     |
| Jones v. Read.....                            | 502, 503           | Lamb v. Clark.....                               | 722                     |
| Jones v. State.....                           | 475                | Lamb v. Irwin.....                               | 358                     |
| Jordon v. Cooper.....                         | 324, 325           | Lamb v. Lathrop.....                             | 177, 178                |
| Joy v. Hull.....                              | 681                | Lamborn v. Watson.....                           | 586                     |
| Judd's case.....                              | 373                | Lamos v. Snell.....                              | 174                     |
| Juland v. Rathbone.....                       | 110                | Lancaster Bank v. Myley.....                     | 294                     |
| Kane v. Bloodgood.....                        | 722                | Landis v. Urie.....                              | 282                     |
| Kane v. Sanger.....                           | 230, 232           | Landon v. Platt.....                             | 681                     |
| Karns v. Kunkle.....                          | 149                | Lane v. Dighton.....                             | 312                     |
| Kean v. McKinsey.....                         | 353                | Lane v. Osment.....                              | 466                     |
| Kegler v. Miles.....                          | 498                | Lanfeor v. Mayor.....                            | 99                      |
| Keim v. Rush.....                             | 279                | Lansing v. Smith.....                            | 258                     |
| Kelly v. Chicago.....                         | 562                | Lansing v. Starr.....                            | 722                     |
| Kelly v. Perry.....                           | 251                | Lanz v. McLaughlin.....                          | 745                     |
| Kelly v. Thompson.....                        | 348                | Larimer's Lessee v. Irwin.....                   | 760                     |
| Kelsey v. King.....                           | 567                | Lathrop v. Hyde.....                             | 158                     |
| Kelty v. Second N. B'k of Erie.....           | 196                | Lawall v. Rader.....                             | 327                     |
| Kemp v. Coughtry.....                         | 323                | Lawrence v. Ballou.....                          | 634                     |
| Kenada v. Gardner.....                        | 119                | Lawrence v. Hagerman.....                        | 689                     |
| Kennedy v. Crandell.....                      | 129                | Lawrence v. Hunt.....                            | 581                     |
| Kennedy v. Le Van.....                        | 564, 566           | Lawrence v. Lawrence.....                        | 446                     |
| Kennedy v. Scovill.....                       | 713                | Lawrence v. Mayor of N. Y.....                   | 84                      |
| Kennon v. McRoberts.....                      | 607                | Lawrence v. Taylor.....                          | 344                     |
| Kerns v. Schoonmaker.....                     | 503                | Lawton v. Erwin.....                             | 145, 147                |
| Kerr v. Gilmore.....                          | 348                | Lawyer v. Smith.....                             | 490                     |
| Keys v. Grannis.....                          | 148                | Lea v. Robertson.....                            | 637                     |
| Kidder v. Barr.....                           | 745                | Leak v. Morrice.....                             | 735, 745                |
| King v. Baldwin.....                          | 715, 719           | Led v. Netherton.....                            | 466                     |
| King v. Fenwicke.....                         | 476                | Lee v. Gause.....                                | 237                     |
| King v. Harman's Heirs.....                   | 720                | Lee v. Muggeridge.....                           | 287                     |
| King v. Inhabitants of Hard-<br>wicke.....    | 695                | Lee v. Selleck.....                              | 142                     |
|   |                    | Lee v. Woolsey.....                              | 494                     |

# CASES CITED.

21

|                                  | PAGE     |                                      | PAGE          |
|----------------------------------|----------|--------------------------------------|---------------|
| Lafevre's appeal.....            | 294      | Lunsford v. Turner.....              | 466           |
| Le Fevre v. Le Fevre.....        | 355      | Lynch v. Postlethwaite.....          | 141           |
| Leggett v. New Jersey etc. Co..  | 99       | Lytton v. Lytton.....                | 592           |
| Lehigh C. & N. Co. v. Harlan.... | 327      |                                      |               |
| Leigh v. Smith.....              | 223      | Mackay v. Bloodgood.....             | 343           |
| Leigh v. Thomas.....             | 257      | Mackie v. Cairns.....                | 207           |
| Leitch v. Hollister.....         | 206      | Mackwreth v. Simmons.....            | 252           |
| Leland v. Lownsdale.....         | 560      | Madison Av. Bap. Church v. Bap-      |               |
| Lench v. Lench.....              | 309, 311 | tist Church.....                     | 110           |
| Leonard v. Sussex.....           | 225      | Magee v. Billingsley.....            | 137, 166      |
| Le Page v. McCrea.....           | 720      | Magee v. Carmack.....                | 188           |
| Lepiot v. Browne.....            | 533      | Magill v. Kauffman.....              | 116, 376      |
| Lepra v. Brown.....              | 533      | Main v. Milbourn.....                | 745           |
| Le Roy v. Fenwicke.....          | 476      | Maitland v. Goldney.....             | 765           |
| Leshey v. Gardner.....           | 313      | Makareth v. Pollard.....             | 144           |
| Leslie v. State.....             | 480      | Mallon v. Hinde.....                 | 717           |
| Letcher v. Cosby.....            | 745      | Malpica v. McKown.....               | 141           |
| Lewis v. Cook.....               | 237      | Maneely v. McGee.....                | 192           |
| Lewis v. Culbertson.....         | 131      | Mankato v. Willard.....              | 561, 562      |
| Lewis v. De Forest.....          | 720      | Manlove v. Bale.....                 | 347           |
| Lewis v. Jones.....              | 579      | Mann v. Lent.....                    | 334           |
| Lewis v. Price.....              | 317      | Mansur v. Haughey.....               | 560, 562, 563 |
| Leyfield's case.....             | 127      | Mansur v. State.....                 | 562, 564      |
| Lick v. Diaz.....                | 634      | Maples v. Browne.....                | 334, 335      |
| Liddle v. Hodges.....            | 158      | Marcy v. Darling.....                | 676           |
| Liggins v. Inge.....             | 677      | Marcy v. Taylor.....                 | 562           |
| Lincoln v. Ellis.....            | 224      | Mark v. Cooper.....                  | 72            |
| Lincoln v. Pelham.....           | 247      | Markle v. Halfield.....              | 180, 186      |
| Lincoln Bank v. Richardson.....  | 707      | Marr v. Rucker.....                  | 503           |
| Lindenmuller v. People.....      | 119      | Marsh v. Weckerly.....               | 355           |
| Lindsey v. Lindsey.....          | 632      | Marshall v. Jones.....               | 721           |
| Lindsley v. Coates.....          | 269      | Martin v. Bigelow.....               | 315           |
| Lingan v. Henderson.....         | 723      | Martin v. Riddle.....                | 689           |
| Lining v. Geddes.....            | 650      | Martin <i>quitam</i> v. McNight..... | 480           |
| Linsley v. Bushnell.....         | 688      | Mary Gregg's case.....               | 377, 381      |
| Lion v. Burtiss.....             | 634      | Maryland Coal Co. v. Edwards..       | 137           |
| Lippincott v. Barker.....        | 207      | Mask v. State.....                   | 379           |
| Little v. Blount.....            | 289      | Mason v. Hawkins.....                | 597           |
| Little v. Cook.....              | 386      | Mason v. Hill.....                   | 419           |
| Livingston v. Mayor of N. Y....  | 84       | Masters v. Polle.....                | 730, 731      |
| Livingston v. Rogers.....        | 127      | Masterson v. Matthews.....           | 145           |
| Lloyd v. Johns.....              | 224      | Matthew v. Fitzsimon.....            | 597           |
| Lloyd v. Learing.....            | 217, 258 | Matthews v. Wallwyn.....             | 438           |
| Lloyd v. Spillett.....           | 308, 310 | Matthews v. Warner.....              | 594           |
| Locker v. Rhoades.....           | 90       | Mattison v. Allanson.....            | 480           |
| Lockhard v. Brodie.....          | 459      | Matts v. Hawkins.....                | 678           |
| Lockland v. Smiley.....          | 568      | Mauck v. State.....                  | 564           |
| Logansport v. Dunn.....          | 561, 568 | Maure v. Harrison.....               | 716           |
| Loudon Bank v. Lee.....          | 721      | Mawbey's case.....                   | 373           |
| Lord Audley's case.....          | 376, 378 | Mayberry v. Inhab. of Standish.      | 566           |
| Lord Pengall v. Ross.....        | 735, 745 | Mayhew v. Crickett.....              | 715           |
| Lord v. Shaler.....              | 724      | Maynard v. Fireman's Fund Ins.       |               |
| Loving v. Hunter.....            | 525      | Co.....                              | 688           |
| Lowe v. Boteler.....             | 406      | Mayor v. Morgan.....                 | 75            |
| Lowery v. Drew.....              | 343      | Mayor v. Ripley.....                 | 612           |
| Lownsdale v. Portland.....       | 560      | Mayor of Jersey City v. Morris       |               |
| Lowrey v. Murrell.....           | 188      | Canal and Banking Co. { 562, 564     |               |
| Loyd's case.....                 | 411      | { 566, 567                           |               |
| Lucas v. Commonwealth.....       | 633      | Mayor etc. of London v. Bolt... 82   |               |
| Lucas v. Wasson.....             | 574      | Mayor of Madison v. Booth.....       | 563           |
| Luddington v. Kine.....          | 749      | Mayor etc. of Memphis v. Wright..... | 492           |
| Ludlam's Estate.....             | 363      | Mayor of New Orleans v. Ripley.      | 721           |
| Ladlow v. Van Camp.....          | 727      | Mayor etc. of N. Y. v. Furze ...     | 94            |
| Luke v. Morris.....              | 735      |                                      |               |

|  | PAGE       |  | PAGE          |
|--|------------|--|---------------|
| Mayor of N. Y. v. Stuyvesant...              | 84         | Middletown Bank v. Morris....          | 196           |
| Mayor of N. Y. v. Pilkington...              | 257        | Middletown Bank v. Russ.....           | 719           |
| Max v. Roberts.....                          | { 539, 540 | Miles v. Diven.....                    | 321           |
|  | { 541, 542 | Miles v. Oden.....                     | 141           |
| Maxim v. Morse.....                          | 289        | Millen v. Tandrye.....                 | 731           |
| Maxson v. Annas.....                         | 119        | Miller v. Brown.....                   | 126           |
| McAfee v. Crofford.....                      | 689        | Miller v. Keene.....                   | 358           |
| McAlister v. Montgomery.....                 | 455        | Miller v. Mariners' Church.....        | 627           |
| McBride v. Hueston.....                      | 256        | Miller v. Miller.....                  | 301, 318, 337 |
| McBride v. McLaughlin.....                   | 685, 689   | Miller v. Ord.....                     | 716           |
| McCampbell v. McCampbell.....                | 607        | Miller v. Race.....                    | 182, 189      |
| McCanta v. Bee.....                          | 458        | Miller v. Roessler.....                | 120           |
| McCarty's case.....                          | 373        | Milliner v. Lucas.....                 | 116           |
| McCarver v. Jenkins.....                     | 505        | Million v. Riley...103, 119, 277,      | 528           |
| McClures v. Hammond.....                     | 517        | Mills v. Abrams.....                   | 237           |
| McClurg v. Lecky.....                        | 207        | Mills v. Lee.....                      | 550           |
| McConnell v. Smith.....                      | 225        | Mills v. Wyman.....                    | 287           |
| McConnel v. Town of Lexington.....           | { 256, 562 | Milne v. Davidson.....                 | 98            |
|  | { 567      | Minter v. Dent.....                    | 396           |
| McCormack v. O'Bannon.....                   | 612        | Mitchell v. Merrill.....               | 178           |
| McCormick's appeal.....                      | 294        | Mitchell v. Tarbutt....541, 542, 543   |               |
| McCormick v. Baltimore....562, 563           |            | Moffit v. State.....                   | 379           |
| McCoy v. Curtice.....                        | 126        | Mohawk Bank v. Broderick....           | 197           |
| McCoy v. Reed.....                           | 277        | Mohawk and Hudson River Co.,           |               |
| McCune v. Weller.....                        | 110        | Matter of.....                         | 62            |
| McCurdy v. Breathitt.....                    | 295        | Moody v. McDonald.....                 | 687           |
| McDermot v. Lawrence.....                    | 292        | Moody v. Smith.....                    | 345           |
| McGlue v. Ellis.....                         | 397        | Moore v. Bray.....                     | 334           |
| McGuinty v. Harrick.....                     | 151        | Moore v. Crose.....                    | 686           |
| McKane v. Bonner.....                        | 398        | Moore v. Moore.....612, 720            |               |
| McKay v. Draper.....                         | 137        | Moore v. Viele.....                    | 289           |
| McKee v. Phillips.....                       | 745        | Moore's Ex'r v. Patterson.....         | 301           |
| McKee v. St. Louis.....                      | 563        | Morell v. Morell.....                  | 80            |
| McKinlay v. Tuttle.....                      | 634        | Morey v. Herrick.....                  | 313           |
| McLain v. Ferrell.....                       | 503        | Morgan v. Bass.....                    | 223           |
| McLoud v. Selby.....                         | 606        | Morgan v. Morgan.....                  | 441           |
| McManus v. Cassidy.....                      | 327        | Morgan v. Potter.....                  | 87            |
| McMillan v. Birch.....                       | 158        | Morgan v. Railroad Co. 562, 563, 568   |               |
| McMonies v. Mackay.....                      | 137        | Moroney v. Copeland.....               | 307           |
| McNaughten v. Partridge.....                 | 343        | Morrill v. Mackman.....                | 681           |
| McPhatridge v. Gregg.....                    | 505        | Morris v. Bowers.....                  | 569           |
| McPherson v. Cunliffe.....                   | 225, 230   | Morris v. Foreman.....                 | 522           |
| McTavish v. Carroll....686, 688,             |            | Morris v. Miller.....                  | 482           |
| McWilliams v. Martin.....                    | 370        | Morris v. Tarin.....                   | 489           |
| Mead v. Mitchell.....                        | 224, 225   | Morrison v. Caldwell.....              | 119           |
| Meason v. Kaine.....                         | 294        | Morrow v. Waltz.....                   | 353           |
| Mechanics' Building Ass. v. Ferguson.....    | 586        | Morris v. Gould.....                   | 633           |
| M. E. Church v. Hoboken.....                 | 566        | Mortimer v. Mortimer.....              | 86            |
| Meek v. Atkinson.....                        | 301        | Morton v. Fletcher.....                | 287           |
| Meeks v. S. P. R. R. Co.....                 | 635        | Moses v. Murgatroyd.....               | 716, 720      |
| Mellor v. Lees.....                          | 347        | Moss v. Bettis.....                    | 517           |
| Mercein v. People.....                       | 87         | Moss v. Gilmore.....                   | 437           |
| Merest v. Harvey.....                        | 689        | Moss v. Vincent.....                   | 214           |
| Merriam v. Bayley.....                       | 289        | Mounsey v. Blamire.....                | 243           |
| Merritt v. Todd.....                         | 196        | Mountstephen v. Brooke.....            | 724           |
| Messenger v. Kuitner.....                    | 329        | Mowatt v. Wright.....                  | 489           |
| Metcalfe v. Connor.....                      | 406        | Mower v. Inhabitants of Leicester..... | 99, 691       |
| Metropolitan Board of Health v. Heister..... | 99         | Mowry v. Providence.....561, 567       |               |
| Meyer v. Huneke.....                         | 129        | Mudd v. Mudd.....                      | 324           |
| Mialhi v. Lassabe.....                       | 745        | Mulmen v. D'Eguino.....                | 194           |
| Michael v. Mowry.....                        | 633        | Muir v. Craig.....                     | 397           |
| Middlemore v. Goodale.....                   | 233        | Muldon v. Whitlock.....                | 192, 641      |
|  |            | Mulloy v. Paul.....                    | 502, 563      |



|  | PAGE          |   | PAGE          |
|--|---------------|---|---------------|
| Mumford v. McKay .....                                       | 574           | Oswald v. Legh .....                          | 724           |
| Munn v. Commissioners .....                                  | 390           | Oswego Starch Factory v. Dollo-<br>way .....  | 75            |
| Murray v. Gouverneur .....                                   | 192           | Otis v. Gazlin .....                          | 288           |
| Murray v. Hay .....  | 84            | Owen v. Davies .....                          | 745           |
| Murray v. Wilson .....                                       | 147           | Owensen v. Morse .....                        | 186           |
| Musselman's appeal .....                                     | 330           | Owings' case .....                            | 458           |
| Musson v. Lake .....   | 142           | Ozman v. Reynolds .....                       | 727           |
| Mutual Ins. Co. of Buffalo v. Su-<br>pervisors of Erie ..... | 75            |   |               |
| Myers v. Myers .....   | 607           | Pacific S. S. Co. v. Commission-<br>ers ..... | 75            |
|  |               | Pack v. Mayor of N. Y. ....                   | 84            |
| Naah v. Smith .....  | 717           | Page v. Ellsworth .....                       | 116           |
| Neil v. Gant .....   | 528           | Page v. Fowler .....                          | 634           |
| Newcomen v. Barker .....                                     | 244           | Paige v. Cagwin .....                         | 124           |
| Newell v. Weeks .....  | 214           | Paine v. Tucker .....                         | 344           |
| New Jersey S. M. Co. Merchants'<br>Bank .....                | 137           | Palk v. Clinton .....                         | 258           |
| Newling v. Francis .....                                     | 35, 41, 49    | Palmer v. Clarke .....                        | 103, 528      |
| Newman v. St. Louis etc. R. R.<br>Co. ....                   | 687, 689      | Palmer v. Mulligan .....                      | 315, 318, 420 |
| Newman v. Wilbourne .....                                    | 398           | Parish of Silverton .....                     | 473           |
| New Orleans v. United States {                               | 362           | Parke v. Leewright .....                      | 745           |
| Newport v. Taylor .....                                      | 568           | Parker v. Donaldson .....                     | 279           |
| New York F. Ins. Co. v. Ely ...                              | 99            | Parker v. Mise .....                          | 686, 688      |
| Niagara Falls Sus. B. Co. v.<br>Bachman .....                | 562, 564      | Parker v. Parker .....                        | 335           |
| Nichol v. Mason .....  | 145, 146, 147 | Parker v. Parmele .....                       | 259           |
| Nichols v. Levy .....  | 459           | Parker v. Redfield .....                      | 681           |
| Nichols v. Nichols .....                                     | 299, 300      | Parker v. Swan .....                          | 524           |
| Noble v. James .....   | 359           | Parker v. Wells .....                         | 745           |
| Nodine v. Greenfield .....                                   | 224           | Parkhurst v. Van Cortland ..                  | 735, 740      |
| Nordfleet v. Colton .....                                    | 253           | Parsons v. Atlanta University ..              | 564, 566      |
| Norman v. Mauciette .....                                    | 116           | Parsons v. Pierce .....                       | 129           |
| Norris v. Baker .....  | 731           | Partridge v. Partridge .....                  | 361           |
| Norris v. Slapps .....                                       | 37            | Pass v. McRae .....                           | 633           |
| North Hempstead v. Hempstead ..                              | 569           | Patapasco Ins. Co. v. Smith ..                | 192           |
| Northern R. R. Co. v. Page .....                             | 166           | Patashall v. Apthorp .....                    | 192           |
|  |               | Patrick v. Johnson .....                      | 147           |
| Oakey v. Russell .....                                       | 262           | Patten v. Ellingwood .....                    | 288, 289      |
| O'Connor v. Forster .....                                    | 262           | Patterson v. Edwards .....                    | 767           |
| O'Herlihy v. Hedges .....                                    | 745           | Patterson v. Lytle .....                      | 355           |
| Ohio v. Trustees of Township<br>Four .....                   | 269           | Patton v. Ryan .....                          | 326           |
| Olathe v. Adams .....  | 479           | Pavey v. Burch .....                          | 518           |
| Oliver v. Pray .....   | 650           | Payton v. Smith .....                         | 465           |
| Olmstead v. Miller .....                                     | 765           | Pearce v. Smith .....                         | 645           |
| Oneida Manuf'g Society v. Law-<br>rence .....                | 135, 163      | Pearson v. Pearson .....                      | 446, 447      |
| O'Neill v. Annett .....                                      | 562           | Peck v. Jenness .....                         | 633           |
| Onstott v. Murray .....                                      | 564           | Peck v. Robinson .....                        | 528           |
|  |               | Peebles v. Reading .....                      | 310, 311      |
| Ontario Bank v. Lightbody ... {                              | 188           | Peebles v. Stephens .....                     | 550           |
|  | 191           | Pelham v. Gregory .....                       | 524           |
|  | 654           | Pemberton v. Allen .....                      | 54, 55, 57    |
| Orange County Bank v. Brown ..                               | 517           | Penfield v. Clarke .....                      | 94            |
| Oriental Bank v. Haskins .....                               | 129           | Penn v. Bennett .....                         | 289           |
| Orme v. Smith .....  | 361           | Pennsylvania v. Bell .....                    | 417           |
| Orphans' Court v. Groff .....                                | 330           | Pennsylvania v. Stoops .....                  | 378           |
| Osborn v. Robbins .....                                      | 115           | Penny Pot Landing case .....                  | 509           |
| Osborne v. Shrieve .....                                     | 748           | Pentz v. Stanton .....                        | 133           |
| Osgood v. Howard .....                                       | 681           | People v. Albany etc. R. R. Co. .             | 110           |
| Ostrander v. Brown .....                                     | 518           | People v. Bangeneaur .....                    | 472           |
| Ostrander v. Walter .....                                    | 126           | People v. Berberich .....                     | 203           |
| Oswald v. Grenet .....                                       | 568           | People v. Carpenter .....                     | 378, 379      |
|  |               | People v. Champion .....                      | 269           |
|  |               | People v. Clark .....                         | 203           |
|  |               | People v. Commissioners .....                 | 75            |
|  |               | People v. Comstock .....                      | 472, 473      |

|  | PAGE           |   | PAGE          |
|--|----------------|---|---------------|
| People v. Cook .....                       | 110            | Pinager v. Gale .....                   | 144           |
| People v. Crossley .....                   | 60, 61         | Pioche v. Paul .....                    | 632, 634      |
| People v. Crosswell .....                  | 272            | Piper v. Smith .....                    | 454, 455      |
| People v. Dill .....                       | 473            | Pitcher v. Patrick .....                | 131           |
| People v. Dolan .....                      | 75             | Pitt v. Knight .....                    | 144           |
| People v. Enoch .....                      | 203            | Pitzer v. Burns .....                   | 727           |
| People v. Fellingner .....                 | 203            | Platt v. Johnson .....                  | 314, 318      |
| People v. Fitzpatrick .....                | 378            | Platt v. Root .....                     | 420           |
| People v. Gardiner .....                   | 203            | Plumer v. Smith .....                   | 267           |
| People v. Gilmore .....                    | 480            | Poage v. State .....                    | 142           |
| People v. Herkimer .....                   | 150            | Polack v. McGrath .....                 | 634, 635      |
| People v. Kingman .....                    | 562            | Police Jury v. Foulhouze .....          | 566, 569      |
| People v. Kipp .....                       | 37, 46         | Pollard v. Schaafer .....               | 71            |
| People v. Kœber .....                      | 145, 146, 147  | Pomeroy v. Mills .....                  | 84            |
| People v. Lieb .....                       | 270            | Pond v. Negus .....                     | 109           |
| People v. Lohman .....                     | 203            | Poorman v. Mills & Co. ....             | 634           |
| People v. Mather .....                     | 376, 475       | Pope v. Fancher .....                   | 687, 688      |
| People v. Mayor .....                      | 633            | Port v. Pearsall .....                  | 84, 563       |
| People v. Mercain .....                    | 378            | Port v. Tradesman's Bank .....          | 720           |
| People v. Newman .....                     | 116            | Porter v. Gunnison .....                | 334, 335      |
| People v. Northrup .....                   | 378            | Porter v. Moores .....                  | 461           |
| People v. Pope .....                       | 569            | Porter v. Noyes .....                   | 94            |
| People v. Platt .....                      | 704            | Porter v. Talcott .....                 | 653           |
| People v. Rector .....                     | 204            | Porter's Lessee v. Cocke, 497, 499, 502 |               |
| People v. Reyes .....                      | 174            | Postmaster-general v. Munger .....      | 652           |
| People v. Rickert .....                    | 340            | Potter v. Brown .....                   | 139           |
| People v. Runkel .....                     | 109            | Potter v. Chapin .....                  | 84, 562       |
| People v. Stephens .....                   | 90             | Potter v. Holden .....                  | 721           |
| People v. Supervisors .....                | 110            | Potter v. Lansing .....                 | 518           |
| People v. Supervisors of Niagara           | 75             | Powell v. Layton .....                  | 539, 541, 543 |
| People v. Tibbets .....                    | 37, 46         | Powers v. Gradon .....                  | 206           |
| People v. Toynbee .....                    | 203            | Prescott v. Union Ins. Co. ....         | 301           |
| People v. Twaddell .....                   | 60, 61         | Preston v. City of Navasold .....       | 568           |
| People v. Utica Ins. Co. ....              | 37, 99         | Preston v. Surgoine .....               | 527           |
| People v. Webb .....                       | 472, 475       | Prewett v. Caruthers .....              | 289           |
| People v. White .....                      | 203            | Price v. M. E. Church .....             | 236           |
| People v. Winkler .....                    | 633            | Price v. Plainfield .....               | 561, 568, 569 |
| People <i>ex rel.</i> Deberetti v. Gale .. | 75             | Price v. Shipp .....                    | 104           |
| People <i>ex rel.</i> Smith v. Peck .....  | 110            | Price v. Thompson .....                 | 561, 569      |
| Peoria Bridge Asso. v. Loomis ..           | 687            | Primate v. Jackson .....                | 476           |
| Perkins v. Mitchell .....                  | 158            | Prince v. Case .....                    | 681           |
| Perkins v. Perkins .....                   | 84             | Prince v. McCoy .....                   | 570           |
| Perkins v. Towle .....                     | 689            | Prince v. Thomas .....                  | 699           |
| Perrine v. Cheeseman .....                 | 295            | Pritchard v. Brown .....                | 313           |
| Peters v. Barnhill .....                   | 406            | Producers' Bank v. Farnum .....         | 142           |
| Peterson v. Mayor etc. N.Y. ....           | 756            | Prudden v. Lindsley .....               | 561           |
| Phelan v. Moss .....                       | 335            | Pruden v. Northrup .....                | 480           |
| Phelan v. San Francisco .....              | 634            | Puckford v. Maxwell .....               | 186           |
| Phettiplace v. Sayles .....                | 548            | Pulford v. Fire Dep. of Detroit ..      | 63            |
| Philadelphia Bank v. Craft .....           | 305            | Pullen v. People .....                  | 379           |
| Phillips v. Gregg .....                    | 337            | Pumpelly v. Village of Oswego ..        | 75            |
| Phillips v. Hall .....                     | 103            | Purcell v. Miner .....                  | 745           |
| Phillips v. Rose .....                     | 326            | Pyke v. Crouch .....                    | 223           |
| Phillips' Lessee v. Robertson .....        | 463            |   |               |
| Phillips v. Thompson .....                 | 716, 720       | Ragan v. McCoy .....                    | 560           |
| Phillips v. Wickham .....                  | 37, 40, 57, 60 | Railroad Co. v. Schurmier .....         | 560, 562      |
| Pickering v. Stamford .....                | 598, 599, 605  | Ramsey's appeal .....                   | 307           |
| Picket v. Allen .....                      | 690            | Randal v. Elder .....                   | 560           |
| Pickett v. Cook .....                      | 687            | Rankin v. Simpson .....                 | 745           |
| Pierce v. Pierce .....                     | 80             | Rapalee v. Stewart .....                | 206           |
| Piercy v. Sabin .....                      | 632            | Rathbone v. Warren .....                | 717           |
| Pierpoint v. Town of Harrisville ..        | 562, 564, 568  | Rawlings v. Commonwealth .....          | 494           |
| Pike v. Bacon .....                        | 343            | Ray v. Harcourt .....                   | 103, 104      |
|  |                | Raynor v. Nims .....                    | 686, 687, 689 |

|   | PAGE       |   | PAGE     |
|---|------------|---|----------|
| Read v. Pope.....                                   | 145,       | Richmond v. Richmond .....                            | 487      |
| Rector v. Deanley .....                             | 634        | Ricker v. Kelly.....                                  | 676, 681 |
| Rector v. Purdy .....                               | 259        | Ricks v. Dillahunty .....                             | 137, 166 |
| Reed v. Bachelder.....                              | 289        | Riddle v. Proprietors.....                            | 99, 691  |
| Reed v. Cook.....                                   | 652        | Rider v. Wager .....                                  | 361      |
| Reed v. McCourt.....                                | 122        | Ridgway, Budd & Co.'s appeal..                        | 294      |
| Reed v. Newburgh.....                               | 62         | Ridout v. Pain.....                                   | 369      |
| Reed v. Ownby.....                                  | 632, 634   | Right v. Russell .....                                | 604      |
| Reed v. Van Ostrand.....                            | 192, 641   | Right v. Sidebotham .....                             | 604      |
| Rees v. Chicago.....                                | 562        | Ritchie v. Moore.....                                 | 131, 522 |
| Rees v. Conococheague.....                          | 522        | Roach v. State.....                                   | 380      |
| Reeside v. Hadden.....                              | 286, 380   | Roberts v. Anderson .....                             | 712      |
| Reeves v. Dougherty.....                            | 502, 503   | Roberts v. Beatty.....                                | 178      |
| Regina v. Challoombe.....                           | 473        | Roberts v. Fisher.....                                | 191      |
| Regnier v. Cabot.....                               | 174        | Roberts v. Roberts.....                               | 400      |
| Reid v. Payne.....                                  | 508        | Robertson v. Kennedy.....                             | 517      |
| Reitenbach v. Reitenbach .....                      | 115        | Robertson v. Robertson.....                           | 312      |
| Remer v. Downer.....                                | 196        | Robinson v. Chamberlain.....                          | 99       |
| Renand v. Peck.....                                 | 116        | Robinson v. Smith.....                                | 721      |
| Rerick v. Kern.....                                 | 681        | Roby v. West.....                                     | 267      |
| Rex v. All Saints.....                              | 380        | Rochester White Lead Co. v. City<br>of Rochester..... | 99       |
| Rex v. Ashwell .....                                | 49, 53     | Rockhill v. Nelson .....                              | 634      |
| Rex v. Azire.....                                   | 376        | Rockwell v. Sheldon .....                             | 758      |
| Rex v. Bathwick.....                                | 380        | Rodes v. Crockett.....                                | 720      |
| Rex v. Bear.....                                    | 473, 475   | Rogers v. Benson.....                                 | 511      |
| Rex v. Bennett.....                                 | 480        | Rogers v. Bradford.....                               | 44       |
| Rex v. Blunt.....                                   | 480        | Rogers v. Grider.....                                 | 512      |
| Rex v. Cliviger.....                                | 379        | Rogers v. Old .....                                   | 279      |
| Rex v. Dean .....                                   | 46         | Rogers v. Walker.....                                 | 355      |
| Rex v. Fleming.....                                 | 407        | Rogers v. Waller .....                                | 466      |
| Rex v. Foxcroft.....                                | 37         | Roll v. Raquet .....                                  | 267      |
| Rex v. Furrer.....                                  | 476        | Romer v. Downer .....                                 | 197      |
| Rex v. Ginever.....                                 | 45, 46, 60 | Rondeaux v. Pedesclaux .....                          | 445      |
| Rex v. Hudson.....                                  | 559        | Roosevelt v. Mark.....                                | 722      |
| Rex v. Jackson.....                                 | 476        | Root v. King .....                                    | 173      |
| Rex v. Lea .....                                    | 472, 574   | Roper v. Roper.....                                   | 248      |
| Rex v. Leake.....                                   | 561        | Rose v. United States Tel. Co...                      | 137      |
| Rex v. Lloyd.....                                   | 256        | Ross v. Blair.....                                    | 466      |
| Rex v. Lyme Regis.....                              | 37         | Ross v. Wharton .....                                 | 461      |
| Rex v. Madden.....                                  | 381        | Routh v. Kinder.....                                  | 716      |
| Rex v. Miller.....                                  | 49         | Rowan's Ex'r v. Portland .....                        | 568      |
| Rex v. Paine.....                                   | 407        | Rowland v. Veale .....                                | 144      |
| Rex v. Pappineau.....                               | 729        | Rowley v. Ball .....                                  | 128      |
| Rex v. Parish of Silverton.....                     | 475        | Rowley v. Bigelow .....                               | 90       |
| Rex v. Passmore.....                                | 41         | Rowley v. Horne.....                                  | 332      |
| Rex v. Praed.....                                   | 473, 474   | Roy v. Duke of Beaufort .....                         | 299      |
| Rex v. Sergeant.....                                | 378, 381   | Rulenbaugh v. Ludwick.....                            | 348      |
| Rex v. Sir Francis Delaval.....                     | 392        | Rung v. Shoenberger .....                             | 569      |
| Rex v. Smith.....                                   | 391        | Rushworth v. Pembroke.....                            | 223, 224 |
| Rex v. Spencer.....                                 | 38, 46     | Russ v. Butterfield .....                             | 288      |
| Rex v. Tapenden.....                                | 46         | Russell v. Clark's Ex'rs .....                        | 716      |
| Rex v. Varlo .....                                  | 49         | Russell v. Green.....                                 | 717      |
| Rex v. Wardens.....                                 | 46         | Russell v. Harris .....                               | 634, 635 |
| Rex v. Westwood.....                                | 35, 37, 49 | Russell v. Hubbard.....                               | 110      |
| Reynolds v. Clark.....                              | 65         | Russell v. Lytle .....                                | 579      |
| Reynolds v. Moore.....                              | 126        | Russell v. Mixer.....                                 | 586      |
| Reynolds' Heirs v. Commission-<br>ers of Stark..... | 256, 257   | Russell v. Richards.....                              | 681      |
| Reynoldson v. Perkins.....                          | 224        | Russell v. Rogers.....                                | 550      |
| Rham v. North.....                                  | 329        | Russell v. The Men of Devon ..                        | 691      |
| Rhea v. Allison.....                                | 496        | Rust v. Larue .....                                   | 124      |
| Rhoads v. Gaul.....                                 | 328        | Ruston v. Ruston.....                                 | 607      |
| Rich v. Rich .....                                  | 152        | Rutherford v. Taylor .....                            | 569      |
| Richart v. Scott.....                               | 318        | Ryall v. Ryall.....                                   | 312      |

|  | PAGE               |                                      | PAGE     |
|--|--------------------|--------------------------------------|----------|
| Sabine v. Johnson .....                        | 533                | Sherrit v. Birch .....               | 258      |
| Sackett v. Andrews .....                       | 146                | Sherwood v. Burr .....               | 518      |
| Safret v. Hartman .....                        | 229                | Shippey v. Henderson { 284, 285, 286 |          |
| Sage v. Woodin .....                           | 104                |                                      | 288, 289 |
| Sailly v. Cleveland .....                      | 134                | Shoemaker v. Benedict .....          | 115      |
| Sailor v. Hertzog .....                        | 358                | Short v. Trane .....                 | 142      |
| Salyers v. Ross .....                          | 613                | Shupe v. Galbraith .....             | 353      |
| Sands v. Taylor .....                          | 137                | Sidle v. Walters .....               | 312      |
| Sanford v. Gaddis .....                        | 767                | Simmons v. Parsons .....             | 400      |
| Sanford v. Meredan .....                       | 564                | Simmons v. Spruill .....             | 254      |
| San Francisco v. Calderwood .....              | 561, 564           | Simmons v. West .....                | 334      |
| San Francisco v. Car-<br>navan { 562, 564, 569 |                    | Simpson v. French .....              | 177      |
|  | 569                | Sims v. Saunders .....               | 398      |
| Sankey's appeal .....                          | 330                | Singer Mfg. Co. v. Holdfokt. 688,    | 689      |
| Saratoga & S. R. R. Co. v. Row.                | 90                 | Sir Henry Vane's case .....          | 485      |
| Sater v. Burt .....                            | 197                | Sir Herbert Packington's case ..     | 711      |
| Satterfield v. Mayes .....                     | 531                | Sites v. Keller .....                | 745      |
| Satterthwaite v. Satterthwaite ..              | 214                | Skett v. Whitmore .....              | 745      |
| Saunders v. Dennison .....                     | 721                | Skinner v. Dayton .....              | 343      |
| Savacool v. Boughton .....                     | 126, 699           | Slater v. Baker .....                | 541      |
| Savings Bank v. Ladd .....                     | 727                | Slaughter v. State .....             | 480      |
| Sawyer v. City of Alton .....                  | 84                 | Sleech v. Thornton .....             | 362      |
| Sawyer v. Fellows .....                        | 121                | Slingerland v. Morse .....           | 175      |
| Sayles v. Smith .....                          | 119                | Sloan v. McConahay .....             | 569      |
| Sayre v. Grymes .....                          | 616                | Slocumb v. Kuykendall .....          | 638, 767 |
| Schenley v. Commonwealth .....                 | 560, 568           | Smalley v. Smalley .....             | 687, 689 |
| Schemerhorn v. Vanderheyden ..                 | 295                | Smart v. Waterhouse .....            | 503      |
| Schermerhorn v. Mayor of N. Y.                 | 84                 | Smith v. Dudley .....                | 121      |
| Schieffelin v. Harvey .....                    | 517                | Smith v. Heuston .....               | 257      |
| Schindel v. Schindel .....                     | 686, 689           | Smith v. Jones .....                 | 196      |
| Schmidt v. Blood .....                         | 518                | Smith v. Kerr .....                  | 158, 343 |
| Schrivver v. Meyer .....                       | 370                | Smith v. Marks .....                 | 589      |
| Schnyler v. Leggett .....                      | 340                | Smith v. McAllister .....            | 122      |
| Schwoserer v. Boylston Mar. Ass.               | 84                 | Smith v. McDonald .....              | 632      |
| Schoff v. Bryson .....                         | 686                | Smith v. Mead .....                  | 141      |
| Scott v. Hancock .....                         | 665                | Smith v. Miller .....                | 796      |
| Scott v. Simmons .....                         | 90                 | Smith v. Mumford .....               | 143, 145 |
| Scouton v. Eisford .....                       | 284, 285, 288, 289 |                                      | 146, 147 |
| Scoville v. Canfield .....                     | 141                | Smith v. Sanford .....               | 279      |
| Scudder v. Trenton Del. Falls Co.              | 713                | Smith v. Smith .....                 | 141, 745 |
| Scudder v. Union Nat. Bank .....               | 142                | Smith v. Tunno .....                 | 663      |
| Seagood v. Meale .....                         | 735, 745           | Smyrl v. Niolon .....                | 517, 518 |
| Seaman v. Price .....                          | 287                | Sneed v. Ewing .....                 | 537      |
| Sears v. Lyons .....                           | 683, 686           | Snively v. Fahnestock .....          | 687      |
| Second Ecc. Soc. v. First Ecc.                 |                    | Snyder v. Andrews .....              | 174      |
| Soc. .....                                     | 696                | Snyder v. Gascoigne .....            | 634      |
| Seidenbender v. Charles .....                  | 267                | Snyder v. Laframboise .....          | 406, 487 |
| Selby v. Bardons .....                         | 632                | Snyder v. Leibengood .....           | 353      |
| Selden v. Cashman .....                        | 689                | Snyder's Leasee v. Snyder .....      | 329      |
| Seymour v. Hartford .....                      | 707                | Sollers v. Lawrence .....            | 145, 147 |
| Seymour v. McDonald .....                      | 84                 | Solomon v. Fitzgerald .....          | 455      |
| Seymour v. Minturn .....                       | 579                | Soule's case .....                   | 378      |
| Shanklin v. Evansville .....                   | 568                | Southern Express Co. v. Womaack.     | 517      |
| Sharp v. Wilhite .....                         | 487                | Spangler v. Springer .....           | 327      |
| Sharpe v. Bingley .....                        | 522                | Sparhawk v. Buell's Adm'r. ....      | 727      |
| Shearman v. Angell .....                       | 525, 537           | Spaulding v. Strang .....            | 206      |
| Sheepshanks v. Lucas .....                     | 270                | Spears v. Hartly .....               | 726      |
| Shelby v. Shelby .....                         | 502, 503           | Speer v. Skinner .....               | 116      |
| Sheldon v. Hopkins .....                       | 145, 149           | Spencer's case .....                 | 230, 551 |
| Sheldon v. Skinner .....                       | 175, 178, 574      | Spencer v. Field .....               | 134      |
| Shelley's case .....                           | 244                | Spering's appeal .....               | 348      |
| Shepard v. Rhodes .....                        | 287                | Squire v. Horder .....               | 313      |
| Shepard v. Turner .....                        | 131                | Stackpole v. Hunen .....             | 158      |
| Sherman v. Dutch .....                         | 685, 689           | Stacy v. Miller .....                | 563      |

# CASES CITED.

27

|   | PAGE          |   | PAGE                       |
|---|---------------|---|----------------------------|
| Stacy v. R. R. ....                         | 634           | State v. Norris .....                     | 417                        |
| Staniford v. Barry .....                    | 386           | State v. Norvell .....                    | 472                        |
| Starr v. Plant .....                        | 713           | State v. O'Bannon .....                   | 198                        |
| Starr v. Scott .....                        | 698           | State v. Patterson .....                  | 381                        |
| State v. Addington .....                    | 412           | State v. Pattaway .....                   | 380                        |
| State v. Allen .....                        | 116           | State v. Phillips .....                   | 472, 475                   |
| State v. Anderson .....                     | 472           | State v. Poll .....                       | 406, 417                   |
| State v. Anthony .....                      | 379           | State v. Reed .....                       | 477                        |
| State v. Atherton .....                     | 560           | State v. Reily .....                      | 472                        |
| State v. Bartlett .....                     | 478           | State v. Reynolds .....                   | 473, 475                   |
| State v. Bennett .....                      | 379           | State v. Rhodes .....                     | 378                        |
| State v. Borden .....                       | 378           | State v. Ross .....                       | 480                        |
| State v. Brown .....                        | 475           | State v. Smith ... 379, 392, 411,         | 412                        |
| State v. Buchanan .....                     | 376, 479      | State v. Spear .....                      | 474                        |
| State v. Buggs .....                        | 380           | State v. Stanton .....                    | 450                        |
| State v. Burlingham .....                   | 379           | State v. Taylor .....                     | 472                        |
| State v. Burnside .....                     | 379           | State v. Tucker .....                     | 564                        |
| State v. Burris .....                       | 472, 474      | State v. Tudor .....                      | 37, 40, 41, 44, 55, 60, 61 |
| State v. Carmichael .....                   | 478           | State v. Twitty .....                     | 150                        |
| State v. Casey .....                        | 477           | State v. Upton .....                      | 472, 475                   |
| State v. Catlin .....                       | 84, 258, 563  | State v. Van Horton .....                 | 479                        |
| State v. Certain Intoxicating Liquors ..... | 437           | State v. Waterman .....                   | 379                        |
| State v. Church .....                       | 479           | State v. Welpton .....                    | 562, 563                   |
| State v. Cole .....                         | 477           | State v. Welsh .....                      | 380                        |
| State v. Colvin .....                       | 477           | State v. West .....                       | 472, 473, 475              |
| State v. Commissioners .....                | 480           | State v. Wilson .....                     | 380                        |
| State v. Credle .....                       | 473, 475      | State v. Woodward .....                   | 561                        |
| State v. Crosby .....                       | 479           | State v. Wright .....                     | 472, 473                   |
| State v. Crow .....                         | 564           | State v. Younger .....                    | 376                        |
| State v. Dark .....                         | 480           | St. Clair v. Tarbox .....                 | 686                        |
| State v. Davidson .....                     | 378           | Steel v. Wright .....                     | 69                         |
| State v. Davis .....                        | 378, 472, 475 | Steele v. Lord .....                      | 129                        |
| State v. De Hart .....                      | 473           | Steele v. Southwick .....                 | 272, 577                   |
| State v. Denton .....                       | 473           | Steiglitz v. Egginton .....               | 155                        |
| State v. Drawdy .....                       | 379           | Stent v. Bailis .....                     | 584                        |
| State v. Freeman .....                      | 472, 475      | Sterrett v. Bull .....                    | 279                        |
| State v. Gardner .....                      | 380           | Stetson v. Patten .....                   | 344                        |
| State v. Goff .....                         | 475           | Stevens v. Nashua .....                   | 564                        |
| State v. Green .....                        | 477           | Stevens v. Stevens .....                  | 681                        |
| State v. Guillard .....                     | 586           | Stevenson v. Austin .....                 | 720                        |
| State v. Hand .....                         | 472           | Stevenson v. Mayor etc. of New York ..... | 110                        |
| State v. Heatherly .....                    | 472, 475      | Stewart v. Allison .....                  | 522                        |
| State v. Hitchcock .....                    | 469, 471      | Stewart v. Coulter .....                  | 131                        |
| State v. Hussey .....                       | 378           | Stewart v. Nuckols .....                  | 528                        |
| State v. Johnson .....                      | 381, 472, 475 | Stiles v. Stewart .....                   | 145, 146, 147              |
| State v. Jones .....                        | 198, 472      | Stillwell v. Barnett .....                | 689                        |
| State v. Kanouse .....                      | 472, 475      | St. John's Lodge v. Callender ..          | 223                        |
| State v. Kattlemann .....                   | 480           | St. Luke's Church v. Mathews ..           | 63                         |
| State v. Kemp .....                         | 472           | Stoeper v. Stoeper .....                  | 347                        |
| State v. Kinney .....                       | 478           | Stone v. Brooks .....                     | 562, 563, 564, 568         |
| State v. Kittle .....                       | 480           | Stoney v. McNeil .....                    | 335                        |
| State v. Kyle .....                         | 479           | Story v. Elliot .....                     | 119, 667                   |
| State v. Lavinia .....                      | 472           | Storm v. Green .....                      | 685, 659                   |
| State v. Lee .....                          | 472           | Stoyel v. Westcott .....                  | 545                        |
| State v. Little .....                       | 477           | Strahan v. Sutton .....                   | 446                        |
| State v. Lowry .....                        | 477           | Strathmore v. Bowes .....                 | 711                        |
| State v. Malling .....                      | 480           | Streety v. Wood .....                     | 158                        |
| State v. Martin .....                       | 472           | Strichler v. Tod .....                    | 314                        |
| State v. Marvin .....                       | 380           | Strong v. Strong .....                    | 80                         |
| State v. McCarty .....                      | 642           | Struthers v. Kendall .....                | 343                        |
| State v. Moody .....                        | 417           | Stuart v. Commonwealth .....              | 486                        |
| State v. Moore .....                        | 380           | Stuart v. Luddington .....                | 119                        |
| State v. Neill .....                        | 378           |   |                            |

|                                    | PAGE          |                                  | PAGE          |
|------------------------------------|---------------|----------------------------------|---------------|
| Stump v. Hughes.....               | 482           | Thomas v. Robinson.....          | 149           |
| Sullivan v. People.....            | 203           | Thomas v. White.....             | 503           |
| Summers v. State.....              | 564, 565      | Thomas v. Wright.....            | 294           |
| Sutton's Hosp. case.....           | 37, 39        | Thomond v. Suffolk.....          | 361           |
| Suydam v. Jones.....               | 84            | Thompson v. Bowers.....          | 174           |
| Swain v. Wall.....                 | 610           | Thompson v. Brown.....           | 238           |
| Swayze v. Hull.....                | 267           | Thompson v. Commonwealth.....    | 379           |
| Sweet v. Green.....                | 553           | Thompson v. Gould.....           | 745           |
| Swick v. Sears.....                | 119           | Thompson v. Houston.....         | 745           |
| Swift v. Larrabee.....             | 721           | Thompson v. Patton.....          | 348           |
| Syracuse etc. R. R. v. Collins..   | 196           | Thompson v. Peniman.....         | 724           |
|                                    |               | Thompson v. Pot.....             | 745           |
| Tabb v. Archer.....                | 606           | Thompson v. Snow.....            | 323           |
| Tabb v. Harris.....                | 103           | Thompson v. Tod.....             | 736           |
| Tallmadge v. Fishkill Iron Co..    | 131           | Thorn v. Blanchard.....          | 156           |
| Tangrey v. Brown.....              | 671           | Thornton v. Illingworth.....     | 724           |
| Taul v. Campbell.....              | 514           | Thrower v. McIntire.....         | 237           |
| Taylor v. Church.....              | 116           | Tillotson v. Cheestham.....      | 689           |
| Taylor v. Deblouis.....            | 461           | Tillson v. Putnam County.....    | 268           |
| Taylor v. Hopper.....              | 84            | Tilly v. Simpson.....            | 369           |
| Taylor v. King.....                | 266           | Timmins v. Gibbins.....          | 189, 191      |
| Taylor v. Robinson.....            | 156, 374      | Tobey v. Barber.....             | 192           |
| Taylor v. Waters.....              | 677           | Todd v. Birdsall.....            | 695           |
| Tennessee etc. R. R. Co. v. Adams. | 492           | Toledo etc. R. R. Co. v. Mc-     |               |
| Terrel v. Page.....                | 370           | Nulty.....                       | 144, 149      |
| Terrell v. Commonwealth.....       | 472           | Tomlinson v. Rowe.....           | 197           |
| Terry v. Bleight.....              | 126           | Tourne v. Lee.....               | 98            |
| Thacker v. Dinsmore.....           | 192, 641      | Touro v. Cassin.....             | 141           |
| Thalhimer v. Brinckerhoff.....     | 124           | Towles v. Burton.....            | 313, 609      |
| Theall v. Theall.....              | 448           | Town of Derby v. Alling.....     | 568           |
| Theidenheit v. Edmondson.....      | 689           | Town of Pawlet v. Clarke.....    | 256, 567      |
| The King v. Brice.....             | 474           | Town of Union v. Crawford.....   | 696           |
| The King v. Burbon.....            | 473           | Townsendsv. Bank of Racine.....  | 188, 191      |
| The King v. Coombs.....            | 624           | Tracy v. Williams.....           | 698           |
| The King v. Davis.....             | 473, 474, 475 | Trimmer v. Trimmer.....          | 116, 152      |
| The King v. Eriswell.....          | 408           | Tripp v. Grouner.....            | 686           |
| The King v. Francis.....           | 480           | Trueman v. Fenton.....           | 288           |
| The King v. Fuller.....            | 198           | Trustees v. Lynch.....           | 84            |
| The King v. Horndon-on-the-hill.   | 678           | Trustees v. Pease.....           | 569           |
| The King v. Johnson.....           | 391           | Trustees v. Walsh.....           | 84            |
| The King v. Jones.....             | 480           | Trustees of Jefferson College v. |               |
| The King v. Mann.....              | 473, 474      | Jackson.....                     | 727           |
| The King v. Moseley.....           | 392           | Trustees of M. E. Church v.      |               |
| The King v. Newton.....            | 680           | Council of Hoboken.....          | 564           |
| The King v. Paine.....             | 409           | Trustees of Rugby Charity v.     |               |
| The King v. Read.....              | 473           | Merrywether.....                 | 559           |
| The King v. Reynell.....           | 473, 474      | Tubb v. Williams.....            | 502           |
| The King v. Smith.....             | 408           | Tuohy v. Chase.....              | 110           |
| The King v. Sutton.....            | 473           | Turlington v. Slaughter.....     | 287           |
| The King v. The Bishop of Wor-     |               | Turner's case.....               | 269, 273      |
| cester.....                        | 616           | Turner v. Baker.....             | 122           |
| The King v. The Inhabitants of     |               | Turner v. Egerton.....           | 390           |
| Chilverscoton.....                 | 698           | Turner v. Partridge.....         | 287           |
| The King v. The Inhabitants of     |               | Turner v. Roby.....              | 145, 146, 147 |
| Hardwicke.....                     | 450           | Turney v. Wilson.....            | 517, 518      |
| The King v. The Inhabitants of     |               | Turton v. Turton.....            | 78            |
| Moor Critchell.....                | 698           | Tuthill v. Wheeler.....          | 126           |
| The King v. Ward.....              | 392           | Tutt v. Brown.....               | 137           |
| The Queen v. Coke.....             | 475           | Tuttle v. Puitt.....             | 248           |
| The Queen v. Russell.....          | 473           | Twelves v. Williams.....         | 307           |
| Thomas v. Blackmore.....           | 514           | Twenty-third Street, Matter of.  | 562           |
| Thomas v. Clark.....               | 522           | Twitchell v. City.....           | 343           |
| Thomas v. Garvan.....              | 338           | Twiff v. Mossey.....             | 288           |
| Thomas v. Hodgson.....             | 286           | Tyler v. Hidorn.....             | 84            |

|   | PAGE          |   | PAGE               |
|---|---------------|---|--------------------|
| Tyler v. Wilkinson.....                       | 315           | Waldron, Matter of.....                 | 391                |
| Tymberley's case.....                         | 374           | Wales v. Stetson.....                   | 704                |
| Uhrlcher v. Litchfield.....                   | 428           | Walker v. Fuller.....                   | 686                |
| Underhill v. Allen.....                       | 745           | Walker's case.....                      | 234                |
| Union Bank v. Jacobs.....                     | 492           | Wallace v. Dixon.....                   | 767                |
| Union Bank v. Knapp.....                      | 279           | Wallace v. Duffield.....                | { 291, 309         |
| Union Bank v. Ridgely.....                    | 52            |   | { 313, 357         |
| Union Bank of Maryland v. Ridge-<br>ly.....   | 49            | Wallace v. Mayor.....                   | 687                |
| Union India Rubber Co. v. Tom-<br>linson..... | 137           | Wallace v. Vigus.....                   | 262                |
| United States v. Batchelder.....              | 198           | Walls v. Bailey.....                    | 166                |
| United States v. Dandridge.....               | 49            | Walsh v. Steamboat H. M.<br>Wright..... | 263                |
| United States v. Fillebrown.....              | 49, 53        | Walton v. Walton.....                   | 363                |
| United States v. Fitton.....                  | 378           | Wanmaker v. Van Bunkirk.....            | 502, 727           |
| United States v. Gilbert.....                 | 472           | Ward v. Clark.....                      | 638                |
| United States v. Halberstadt.....             | 480           | Ward v. County of Hartford.....         | 695                |
| United States v. Lane.....                    | 508           | Ward v. Evans.....                      | 186                |
| United States v. Macomb.....                  | 116           | Ward v. Green.....                      | 323                |
| United States v. Miles.....                   | 380, 381      | Ward v. Sheppard.....                   | 469                |
| United States v. Parrott.....                 | 713           | Ward v. Vickers.....                    | 220, 221           |
| United States v. Prentice.....                | 131           | Warden v. Greer.....                    | 262                |
| United States v. Smallwood.....               | 378           | Warder v. Arell.....                    | 141                |
| United States v. Wade.....                    | 379           | Ware v. State.....                      | 390                |
| Uppike v. Titus.....                          | 287           | Ware v. Strutt.....                     | 188                |
| Vachel v. Breton.....                         | 597, 599, 605 | Waring v. Favcnk.....                   | 133                |
| Vanaken v. Hornbeck.....                      | 128           | Waring v. Mason.....                    | 137, 166           |
| Vanderbilt v. Perse.....                      | 156           | W. & A. R. R. Co. v. Kelly.....         | 518                |
| Vanderheyden v. Vanderheyden.....             | 645           | Warren v. Fearnside.....                | 463                |
| Vandersce v. McGregor.....                    | 158           | Warren v. Grand Haven.....              | 569                |
| Vane v. Lord Barnard.....                     | 711           | Warren v. Helm.....                     | 720                |
| Van Etten v. Hurst.....                       | 146           | Warren v. Hunter.....                   | 318                |
| Van Nest v. Yoe.....                          | 206           | Warren v. Mayor of Lyons.....           | 561, 569           |
| Van Orden v. Van Orden.....                   | 448           | Warren v. Van Pelt.....                 | 167                |
| Van Raugh v. Van Arsdalen.....                | 139           | Washington B. Co. v. Stewart.....       | 634                |
| Van Rensselaer v. Read.....                   | 84            | Waterman v. Soper.....                  | 729                |
| Van Riper v. Van Riper.....                   | 119           | Waters v. Mattingly.....                | 550                |
| Van Wyck v. Aspinwall.....                    | 158           | Waters' Rep. v. Riley's Adm'r.....      | 612                |
| Van Wyck v. Guthrie.....                      | 158           | Watertown v. Cowen.....                 | 561                |
| Varick v. Jackson.....                        | 115           | Watkins v. Baird.....                   | 301                |
| Varner v. Nobleborough.....                   | 192, 641      | Watson v. Gregg.....                    | 337                |
| Varnum v. Camp.....                           | 207           | Watson v. Smith.....                    | 466                |
| Vass v. Commonwealth.....                     | 417           | Watson v. Watson.....                   | 126                |
| Vassault v. Austin.....                       | 632           | Waugh v. Leach.....                     | 567                |
| Vaughan v. Phebe.....                         | 484, 487      | Way v. Sperry.....                      | 289                |
| Vaughn v. Ferris.....                         | 327           | Weall v. Kin.....                       | 541, 542, 543, 544 |
| Venata v. Jones.....                          | 560           | Weaver v. Wood.....                     | 353                |
| Verner v. Switzer.....                        | 323           | Web v. Paternoster.....                 | 677, 680           |
| Vicary v. Moore.....                          | 327           | Webb v. Moler.....                      | 569                |
| Vickery v. Tofts.....                         | 572           | Webster's case.....                     | 407                |
| Vicksburg etc. R. R. Co. v. Pat-<br>ton.....  | 687, 688      | Weeks v. Lowerre.....                   | 116                |
| Villa Real v. Lord Galway.....                | 446           | Weet v. Trustees of Brockport.....      | 99                 |
| Vowell v. Thompson.....                       | 62            | Welch v. Nash.....                      | 729                |
| Vrooman v. Phelps.....                        | 264           | Welch v. Sullivan.....                  | 632                |
| Wainright v. Webster.....                     | 188           | Weld v. Bonham.....                     | 717                |
| Wait v. Maxwell.....                          | 487           | Wellington et al., Petitioners.....     | 492                |
| Wait v. Morris.....                           | 289           | Wells v. Bannister.....                 | 676                |
| Warto v. Leggett.....                         | 480           | Wells v. Cone.....                      | 116                |
| Walbridge v. Harroon.....                     | 288, 289      | Wells v. Evans.....                     | 344                |
| Walcott v. Canfield.....                      | 541           | Wendell v. Jackson.....                 | 229                |
|   |               | Wendell v. Mayor etc. of Troy.....      | 99                 |
|   |               | Wenell v. Adney.....                    | 287                |
|   |               | West v. Randall.....                    | 716                |
|   |               | West v. West.....                       | 237                |
|   |               | Westfall v. Braley.....                 | 188, 191           |

|                                    | PAGE               |                                 | PAGE          |
|------------------------------------|--------------------|---------------------------------|---------------|
| Westgate v. Handlin.....           | 120                | Williamson v. Turner.....       | 522           |
| Westmeath v. Westmeath.....        | 86                 | Willing v. Peters.....          | 281, 282      |
| West River Bridge Co. v. Dix....   | 707                | Willis v. Havemeyer.....        | 149           |
| West School District v. Merrills.. | 700                | Willis v. Owen.....             | 632           |
| Wetmore v. White.....              | 736, 745           | Willison v. Watkins.....        | 399, 465      |
| Weymouth v. Boyer.....             | 717                | Wills v. Slade.....             | 224           |
| Whaler v. Ahi.....                 | 318                | Wilson v. Deen.....             | 72            |
| Wharf v. Howell.....               | 347                | Wilson v. Foreman.....          | 311           |
| Wheatley v. Baugh.....             | 318                | Wilson v. Hunter.....           | 343           |
| Wheaton v. Baker.....              | 90                 | Wilson v. Mayor of N. Y.....    | 75            |
| Wheeler v. Dakin.....              | 148                | Wilson v. Rastall.....          | 489           |
| Wheeler v. Gilsey.....             | 84                 | Wilson v. Reed.....             | 571           |
| Wheeler v. Robb.....               | 638, 767           | Wilson v. Smith.....            | 464           |
| Wheeler v. Wheedon.....            | 206                | Wilson v. Spencer.....          | 267           |
| Whillidge v. Wait.....             | 356                | Windham v. Rhame.....           | 688, 689      |
| Whipp v. State.....                | 378                | Winkfield v. Packington.....    | 390           |
| Whitaker v. Brown.....             | 123                | Winona v. Huff.....             | 568           |
| Whitbeck v. Van Ness.....          | 192, 652, 653      | Winstead v. Winstead.....       | 528           |
| Whitby v. Whitby.....              | 514                | Winter v. Brookwell.....        | 677           |
| Whitcomb v. Whiting.....           | 404                | Winter v. Peterson.....         | 689           |
| White v. Cushing.....              | 289                | Wiseman v. Lyman.....           | 652           |
| White v. Smith.....                | 564                | Withy v. Mumford.....           | 232           |
| White v. St. Guirons.....          | 665                | Wolfe v. Washburn.....          | 151           |
| Whitesides v. Russell.....         | 261                | Womble v. Battle.....           | 254           |
| Whiteford v. Commonwealth.. }      | 204                | Wood v. Braddock.....           | 405           |
| Whitfield v. Whitfield.....        | 685, 688           | Wood v. Hartford F. Ins. Co.... | 695           |
| Whiting v. Wilkins.....            | 748                | Wood v. Hubbell.....            | 71, 72        |
| Whitman v. Graddie.....            | 613                | Wood v. Jones.....              | 745           |
| Whitney v. Allaire.....            | 167                | Wood v. Lake.....               | 677           |
| Whitney v. Brooklyn.....           | 692                | Wood v. Medley.....             | 214, 215, 216 |
| Whitney v. Shufelt.....            | 146                | Wood v. Seely.....              | 84            |
| Whitney v. Union Railway Co..      | 84                 | Wood v. Veal.....               | 562           |
| Wickes v. Clutterbuck.....         | 698                | Woodcock's case.....            | 378           |
| Wiggins v. Keizer.....             | 287                | Woods v. Wallace.....           | 348           |
| Wiggins v. Tallmadge.....          | 84                 | Workman v. State.....           | 379           |
| Wilber v. Paine.....               | 745                | Worrall v. Munn.....            | 343, 344      |
| Wilcox v. Smith.....               | 126                | Wort v. Jenkins.....            | 687           |
| Wilder v. St. Paul.....            | 563                | Wright v. Crockery Ware Co....  | 192           |
| Wilds v. Layton.....               | 468                | Wright v. Howard.....           | 418           |
| Wilkes v. Ferria.....              | 207                | Wright v. Leclaire.....         | 727           |
| Wilkinson v. Adam.....             | 592                | Wright v. Morley.....           | 716           |
| Wilkinson v. Stafford.....         | 301                | Wright v. Reed.....             | 653           |
| Willard v. Tillman.....            | 71                 | Wright v. Wright.....           | 129           |
| Willard v. Willard.....            | 313                | Wynn v. Alston.....             | 250, 251, 253 |
| Willett v. McConnell.....          | 651                | Wynn's case.....                | 251           |
| Willett v. Overton.....            | 650                | Wynne v. The Governor.....      | 271           |
| Willey v. Strickland.....          | 144, 145, 148, 149 | Yarborough v. Newell.....       | 466           |
| Williams v. Beeman.....            | 236                | Yard v. Eland.....              | 350           |
| Williams v. Branson.....           | 517, 518           | Yates v. Foot.....              | 134           |
| Williams v. Curry.....             | 689                | Yates v. Smith.....             | 634, 635      |
| Williams v. East India Co.....     | 624                | Yeatman v. Woods.....           | 455           |
| Williams v. Grant.....             | 517                | Yortheimer v. Keyser.....       | 289           |
| Williams v. Johnson.....           | 451                | Young v. Adams.....             | 184           |
| Williams v. The Church.....        | 569                | Young v. Mertens.....           | 687           |
| Williamson v. Farrow.....          | 434, 435           | — v. Sage.....                  | 573           |
| Williamson v. Fountain.....        | 455                |                                 |               |



**AMERICAN DECISIONS.**  
**VOL. XXVII.**



CASES  
IN THE  
SUPREME COURT OF JUDICATURE  
OF  
NEW JERSEY.

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TAYLOR v. GRISWOLD.

[2 GREEN LAW, 222.]

**CORPORATION HAS POWER TO MAKE A BY-LAW** regulating the mode of calling meetings for the election of its officers, and if such by-law is reasonable, and not repugnant to the charter, nor to any law of the state, it is valid, and a meeting called in conformity thereto is a legal meeting.

**PROXY, RIGHT OF VOTING BY.**—The common law requires all votes to be given in person, and a by-law of a corporation which gives to its members the right to vote by proxy is repugnant to law, and therefore void, unless the charter of such corporation, either expressly or by legal implication, confers the power to make such a by-law.

**EACH STOCKHOLDER OF A CORPORATION HAS BUT ONE VOTE** when the charter incorporates individuals by name, and gives to a majority of them and their successors the joint powers of the corporation; hence a by-law of such corporation, which provides that each share of stock shall be entitled to a vote, is void.

**APPLICATION** to set aside an election for directors of the Passaic and Hackensack Bridge Company. The opinions state the case.

*Pennington and Vanarsdale*, for the applicants.

*Dodd and Wall*, contra.

By Court, **HORNBLOWER, C. J.** This is a proceeding under the fourth section of the act to prevent fraudulent elections by incorporated companies, etc., passed the eighth of December, 1825. On the third day of August last, an election was held for directors, etc., of the Passaic and Hackensack Bridge Com-

pany, which resulted in the choice of George Griswold and others. An application is now made by John Taylor and others, to set aside that election on three distinct grounds, viz.: 1. That notice of the time and place of election was not given according to law; 2. That the inspectors acted contrary to law in rejecting the votes that were offered by proxies; and, 3. That the inspectors also erred in allowing to each stockholder but one vote, instead of a vote for each share owned by him.

Each of these objections will be considered in the order above stated.

1. Was due and legal notice given of the time and place of holding the election? At a meeting of the stockholders held on the fourth of August, 1821, a by-law was passed, prescribing the mode in which all future meetings of the stockholders should be convened; and it is admitted that the meeting held on the third of August last was called and advertised in conformity thereto. But it is insisted that the stockholders had no right to pass any by-law to that effect, because the charter has prescribed the mode in which such meetings are to be called, and how notice shall be given. The third section of the act incorporating the company, after naming the first president and other officers, proceeds as follows: "Which president, etc., shall continue in office during the term of one year from the time of passing this act, or until other persons shall be appointed in their stead, by a majority of the stockholders, at a meeting of the said stockholders to be convened for that purpose, which meeting may be called by any three stockholders, provided fifteen days' notice of the time and place of the said meeting be given in writing to each of the said stockholders residing in this state or in the city of New York, or left at his or her usual place of abode." And then the following clause is added: "and also that it shall and may be lawful for the said corporation, or a majority thereof, to appoint annually, or at any time they shall deem proper, a president, secretary, etc., or any other officer or officers they shall judge necessary." If the legislature have in this section laid down and prescribed the manner in which all meetings of the stockholders for the purpose of choosing officers shall be called, then it must be conceded, that the by-law of the fourth of August, 1821, is illegal and void: *Angell & Ames on Corp.* 195; *Child v. The Hudson Bay Company*, 2 P. Wms. 207. But if the legislature have only prescribed the manner in which the first meeting for the choice of officers should be convened, then it is equally

clear, that the corporation had, by implication, the right to prescribe the mode by resolutions or by-laws, in which subsequent meetings should be called for the purpose of elections: *Angell & Ames on Corp.* 63 *et seq.*; *Newling v. Francis*, 3 T. R. 189; *Rex v. Westwood*, 7 Bing. 1; S. C., in 20 Eng. Com. Law, 11, 51.

This presents a question of construction; and we have nothing to lead us to the mind and intention of the legislature, but the language they have used in connection with the object they had in view. Having erected the proprietors into a body politic, and appointed the first set of officers, it was natural and proper for the legislature to point out a mode in which the corporation might supersede or remove those officers, and appoint others in their places, as well as authorize subsequent changes, and a succession of officers to be kept up. The officers named in the charter were to continue in office one year, or until others should be elected, at a meeting to be convened for that purpose. For what purpose? Obviously for the purpose of electing others in the places of those named in the act; and then the charter prescribes the mode in which that special and particular meeting shall be called, "which meeting may be called by any three stockholders," etc.

This was a just and reasonable provision; for the officers named in the charter, even if they had the power to convene a meeting for the choice of others, might have neglected to do so, or have thought proper not to exercise such power, and thus have perpetuated themselves in office. The legislature having thus organized the company, and made provision for removing the first set of officers, upon the call of any three stockholders, superadded the power to appoint annually or oftener, if they thought proper, a president, etc., or such other officers as they might judge necessary, leaving the time, place, and manner of giving notice thereof to be regulated by the company. This power, given by the latter clause of the section to the "corporation, or a majority thereof," annually, or at any time, to appoint, etc., is utterly inconsistent with the idea, that all meetings are to be called in the manner pointed out in the former part of the section. The call there contemplated is the voluntary and individual act of any three stockholders; but the authority given in the latter clause is to be exercised by, and to be the act of, "the corporation, or a majority thereof." Upon any other construction, no new or other officers could be appointed by the corporation; and any three stockholders

might, at any time, convene a meeting for the purpose of an election, contrary to the will of the corporation, acting in its collective and legislative capacity, lawfully expressed.

I am therefore of opinion the corporation had a right to make a by-law regulating the mode of calling meetings for the purpose of electing officers. The by-law in question is a reasonable one, not repugnant to the charter, nor to any law of the state. It is, therefore, valid; and the meeting on the third of August last having been called in conformity to it, the first objection is not well taken, and must be overruled.

2. Did the inspectors of the election act contrary to law, in rejecting the proxies?

If corporations have a right to dispense with the personal attendance of their members to conduct their affairs, and decide their elections by the instrumentality of proxies or attorneys, we must find it in the elementary principles of the institution, in the nature, design, and fundamental constitutions of corporations, or in some new and positive enactment or grant of the creating power. In other words, we must find such authority among the incidental rights and attributes of all corporate bodies, or in some special power granted by the government to the particular corporation in question.

The right of voting by proxy, in this case, is claimed by the applicants, first, upon general principles, and, secondly, upon the ground of an existing by-law, or the usage and practice of the company.

1. The first inquiry, then, is, whether, upon general and common law principles, the members of any corporation have a right, as a matter of course, to be represented and to vote by proxy? This question must be answered in the negative. It is clear, that when the charter is silent, and no by-laws have yet been passed regulating the mode of election and of voting upon other questions that may arise in conducting the ordinary and appropriate business of the corporation, the corporators, when lawfully assembled, must be governed by the same rules and principles that prevail in all primary assemblies. That is, until a different rule has been established by some competent authority, every question must be decided, and every election determined, by the majority; or, in other words, by the major part, numerically, of those who are personally present and voting. To illustrate my meaning, let it be supposed that the charter expressly authorizes the company to determine whether the members of it shall be permitted to vote by proxy or not.

At the very first meeting of the company the question is proposed: How shall members vote on this question? In person or by proxy? Certainly not by proxy, for that would be to admit proxies before there is any law to authorize their admission. This primary vote must then be given and determined by the majority of the corporators present and voting in person: *Angell & Ames on Corp.* 67; *Rex v. Foxcroft*, 2 Burr. 1017; 2 Kent Com. (1st ed.) 236; *Phillips v. Wickham*, 1 Paige Ch. 598. And to these authorities may be added, *The State v. Tudor*, 5 Day, 329 [5 Am. Dec. 162], for the court in that case fully admit the general rule as above stated.

2. But, secondly, the right of voting by proxy in this case is claimed under existing by-laws, or the usage and practice of the company. The validity of this claim depends upon the answer which must be given to another question, namely, whether this corporation, either incidentally, or in virtue of anything contained in the charter, has a right to make such a by-law, or to adopt such usage. Let us then inquire, first, is the right to make such a by-law one of the natural and incidental powers of a corporation? When the crown creates a corporation, it grants to it, by implication, all powers that are necessary for carrying into effect the object for which it was created. This is according to the legal principle expressed in the maxim: "*Qui concedit aliquid concedere videtur et id, sine quo res ipsa esse non potest*:" 11 Co. 52. It is, therefore, incidental to every corporation to have the power of making by-laws, regulations, and ordinances, relative to the purposes for which it was instituted: *Sutton's Hosp. case*, 10 Co. 31, b; *Norris v. Stapps*, Hob. 211; *City of London v. Vanacre*, 1 Ld. Raym. 496; *Rex v. Westwood*, 7 Bing. 1; S. C., 20 Eng. Com. Law, 11, 51; *Company of Feltmakers v. Davis*, 1 Bos. & Pul. 100; *Rex v. Lyme Regis*, Dougl. 158.

But this incidental power of legislation is limited, not only by the terms of the charter, according to the maxim, "*Expressum facit cessare tacitum*," Co. Lit. 210, a, but by the spirit and design of the charter: the purpose for which it was created, the object which the crown or the legislature had in view, and the general principles and policy of the common law: *Angell & Ames on Corp.* 184, and cases there cited; *Sutton's Hosp. case*, 10 Co. 30; *Child v. The Hudson Bay Co.*, 2 P. Wms. 207; *People v. Utica Insurance Co.*, 15 Johns. 383 [8 Am. Dec. 243]; *Firemen's Insurance Co. v. Ely*, 2 Cow. 699; *People v. Tibbets et al.*, 4 Id. 358; *People v. Kip et al.*, 4 Id. 382, in note; *Angell & Ames on Corp.* 188, sec. 4.

If, in view of these first and elementary principles, we repeat the question, whether the right to make a by-law, dispensing with the personal attendance of members, and permitting them to appear and vote by proxy, is incident to a corporation, the answer must be in the negative. Such a power is not essential, nor even apparently necessary, to carry into effect the objects for which corporations are generally created. If the question is again asked, in reference to this particular corporation, the same answer must be given, and more emphatically, for the same reason. "The true test of all by-laws," says Mr. Justice Wilmot, "is the intention of the crown in granting the charter, and the apparent good of the corporation:" *Rex v. Spencer*, 3 Burr. 1838. What, then, was the object and design of the legislature in creating this corporation? That it was not for the purpose of instituting a stock company, merely or principally, for the acquisition of property, will appear in the sequel of this investigation. But it was to enable the owners or lessees of certain existing property, in the preservation and good management of which the public had a deep and important interest, to adopt such measures as would give permanency and security to the institution, and be calculated to promote their own and the public benefit. If from the nature of things this charter would be inoperative, or in any measure fail to effect or secure the benign objects the legislature had in view, unless we annex to it the power of making such a by-law as the one under consideration, then it follows that the corporation has the power by implication, and as an incident to the charter. But that the right of voting by proxy is essential to the attainment of the objects and design of the charter, will not be seriously pretended. If we test the validity of the by-law in question, or the incidental right of the corporation to make it, by the latter branch of the rule just quoted, viz., "the apparent good of the corporation," the claim will be found equally untenable. It may be for the personal convenience of members, but it can not be for the good of the corporation, that its business or election should be conducted by proxies. The interest of the company, the good of the public, would be better promoted and more effectually secured by the personal attendance of, and mutual interchange of opinions among, the members, than by the action of proxies. At least, this is the fair and legal presumption. If one member may appear and vote by proxy at elections, and on other matters of vital importance to the institution, then all may, and so the welfare and interest of the company and of the



public be utterly neglected. In short, so far from its being incident to a corporation to make such a regulation, it is at variance with the spirit and "with the fundamental principles of our civil and political institutions." And it is confidently believed that not an authority can be found, nor a case produced, in support of the position that the right of making such a by-law is incident to a corporation of any description, public or private.

Speculations upon the evil consequences that have resulted to many of our incorporated institutions, and especially to our banks, by this and other innovations upon the salutary principles and rules of the common law, do not become this place or occasion, but may well deserve the grave consideration of another department of government.

2. The next inquiry is, whether the power of making a by-law, that members may vote by proxy, is given by the general clause in this charter authorizing the company to make by-laws for their government. It is in the following words: "That the said corporation, or a majority thereof, shall, from time to time, etc., have full power to make such by-laws, resolves, and regulations for their government, as they shall deem proper, which shall be binding on the said corporation in all respects; provided they be not repugnant to any part of this act, nor to the constitution and laws of this state."

We have seen that the power of making such a by-law is not incident to, nor one of, the inherent rights or attributes of a corporation; and it remains to inquire whether it has been delegated to this company by the general clause above recited. But if it shall be found that the clause referred to confers no legislative powers on the corporation, except such as it would have possessed if that clause had been entirely omitted; then the right contended for does not exist, since such an extraordinary power is not incident to, and can not be exercised by, a corporation, unless specially delegated by charter. What authority then is given by this clause to the corporation? In one word, "to make such by-laws for their government as they shall deem proper, not repugnant to the charter, or the laws of the state." But this is just what the corporation might have done if no such clause had been inserted in the charter. For the moment a corporation is created, the right to make ordinances for its good order and government is tacitly annexed to it as a legal incident: *Sutton's Hosp. case*, 10 Co. 30, and other cases before cited; *Angell & Ames on Corp.* 177, and cases there cited.

If the legislature intended to delegate to this corporation other and more extensive powers on this subject than such as are incident to every corporation, they have utterly failed in the attempt, and we can not mend the charter. The well-known learning, industry, and research of the counsel for the applicants, have failed to furnish us with a single case, except the one from Day's reports, ancient or modern, at home or abroad, in which it has been judicially determined that a corporation, either in virtue of its incidental powers, or of a general authority to make by-laws, like that given in this charter, may delegate to its members the right of voting by proxy. But the confidence and zeal with which the claim to this right was urged and maintained on the argument, demand of us a respectful and particular examination of the authorities that were cited. Chancellor Kent, in the second edition of his commentaries, 294, after stating the general rule, that every vote must be given in person, adds, that "in the case of moneyed corporations, instituted for private purposes, it has been held that the right of voting by proxy might be delegated by the by-laws of the institution, when the charter was silent." This remark was evidently made in reference to the case of *The State v. Tudor*, 5 Day, 329 [5 Am. Dec. 162]. If the learned commentator had given to that decision the high sanction of his approbation, it would certainly have added great weight, if not a preponderating influence, to the opinion of the court in that case. But the chancellor simply refers to it as a matter of legal history, intimates no opinion, and leaves the case to stand or fall by its own merits. In *Phillips v. Wickham*, 1 Paige Ch. 598, Chancellor Walworth, after stating explicitly that the right of voting by proxy is not a general right, and that the party claiming it must show a special authority for that purpose; and after adverting to the fact, that the exercise of the power by the peers of England is *ex licentia regis*, remarks, that "it may possibly be delegated in some cases by the by-laws of a corporation, where express authority is given by the charter, to make such by-laws regulating the manner of voting." It can not then be pretended that either of the learned jurists just named are authorities for the doctrine. The former intimates no opinion in support of it, and the latter only supposes it possible where the charter, in terms, authorizes such by-laws regulating the manner of voting.

But it is said, that where the mode of election to corporate offices is not prescribed by charter, or settled by immemorial

usage, it may be wholly ordained and regulated by by-laws. This is the general proposition laid down by Angell & Ames on Corp. 195, and is undoubtedly true. In such case it is incident to the corporation to prescribe and regulate the time and place of voting, to appoint inspectors, to determine whether the election shall be *viva voce* or by ballot; and, perhaps, even to direct the form of the tickets: *Commonwealth v. Woelper*, 3 Serg. & R. 29 [8 Am. Dec. 628]. It does not follow, however, that the corporation has a right to permit its members to delegate their corporate rights, and send an agent or proxy to represent, deliberate, judge, and vote for them. The obligation and the duty of corporators to attend in person, and execute the trust or franchise reposed in or granted to them, is implied in, and forms a part of, the fundamental constitution of every charter in which the contrary is not expressed. Accordingly, when we look at the cases cited by Angell & Ames, in support of the general proposition above stated, we find they establish no more than the general principle, that corporations may regulate the manner of elections, if they do not infringe their charter or the laws of the state: *Newling v. Francis*, 3 T. R. 189; *Rex v. Passmore*, Id. 199.

The case of *The State v. Tudor*, 5 Day, 329 [5 Am. Dec. 162], as I have remarked before, stands alone. The charter contained a general clause, very much like the one in this case, authorizing the company to ordain such by-laws as they might deem necessary for the government of the institution. It was, like this, the case of a bridge company, and they had passed a by-law allowing stockholders to vote by proxy. The question was on the validity of that by-law. Six of the nine judges, then composing that respectable court, were of opinion, the by-law was valid; the other three, one of whom was the learned Mr. Justice Reeve, dissented. Ingersol, J., who delivered the opinion of the court, seemed to think that incorporated societies, "whose object is the acquisition of property," stand, in this respect, on a different footing from those which are "instituted for the public good; either for the good of the whole state, or of a particular town or society." In all corporations of the latter kind, he agrees "most fully" that every vote must be given in person, and then adds, "there is no deviation from this rule; the authorities on this subject are uniform;" yet, basing himself on the distinction thus intimated, and without the support of a single authority, the learned judge proceeds, for the first time, to establish the by-law in question.

With all due deference to that very able and learned court, I can not follow in their steps, in a path so newly trod, and upon a line so undefined and undefinable as the one they have attempted to mark out. In this day of corporations, it is not easy to point out so distinctly the separating line between such as are created merely for the acquisition of property, and such as are instituted purely for the public good, or the good of a particular district of country, as to render it a safe and certain criterion by which to determine this question. If the right of voting by proxy, in the case now before us, depended upon the legal accuracy and soundness of that distinction, it would be necessary, before we could apply the rule, to ascertain the origin and true character and design of this institution; that is, we must first determine whether it was formed merely or principally "for the acquisition of property," or, whether it was created for "the public good, or the good of a particular district of country." But, it is apprehended, such an inquiry would not, upon the doctrine contended for, lead to any favorable result for the applicants. Whatever may be its present object, or principal pursuit, it is very manifest from the history of the institution, as it may be read upon our statute books, that it did not originate in any project for private speculation, at least so far as the legislature were concerned in its creation. The very first action of the legislature upon this subject, and several of the succeeding acts, had in view a great public benefit and improvement; and so far from proposing a private corporation or moneyed institution, they contemplated the erection of the bridges and roads, by means of lotteries and voluntary donations, and the collection of no more tolls than would be necessary to maintain and keep them in repair. These bridges were intended to be, what bridges and ferries really are, *publici juris*: Vattel, b. 1, c. 9, sec. 100, etc.; *Charles River Bridge Company v. Warren Bridge Company*, 7 Pick. 495, etc.; *Beekman v. Saratoga and Schenectady R. R. Company*, 3 Paige Ch. 45, 76 [22 Am. Dec. 679].

In 1790, when the first act was passed, the great highway between the eastern and southern sections of our country lay through the town of Newark; and in addition to the public-spirited motive of facilitating the general course of traveling, it was considered immensely important to that place, and the whole district of country lying north and north-west of it, to secure the erection of good and permanent roads and bridges from Newark to the Hudson river. It is true, when it was ascer-

tained that the object could not be effected by lotteries and private donations, certain individuals took a lease from the commissioners, erected the bridges, divided the capital employed, into shares, and finally became incorporated by the charter now under consideration. There is, no doubt, a plain and obvious distinction, important for many purposes, between public and private corporations; between such as are created for political and municipal purposes, and such as are instituted for the government of particular societies, or the management and protection of private property: *Dartmouth College v. Woodward*, 4 Wheat. 668. In corporations of the former class, that is, public corporations, the right of voting by proxy is not claimed; neither is it pretended to exist or be incident to all private corporations, as distinguished from public or political. In religious, literary, and benevolent societies, no such right has ever been lawfully exercised, so far as I can learn. We must look for it then, among that class of private corporations which consists of canal, railroad, bridge, turnpike, banking, manufacturing, and trading companies. But public good is the avowed object of all such institutions; and however private property and emolument may be involved, the public have a deep and important interest in the government and success of every one of them. In short, they are all, in an important sense, public institutions. A bank, whose stock is exclusively owned by individuals, is in legal sense a private corporation, but its objects and operations partake of a public nature; and the same may be affirmed of insurance, canal, bridge, turnpike, and railroad companies: *Per Story, J.*, 4 Wheat. 669. If, however, the right of voting by proxy is to be conceded to banking, insurance, and mercantile companies, upon the ground that they are strictly private corporations, the same can not be predicated of bridge, nor perhaps of canal, turnpike, and railroad companies. They certainly partake more of a public nature, and the public have a more direct and immediate interest in their management. Banks and insurance companies may discontinue their operations when they please; they are not compellable to lend their money to, or to underwrite for, any individual. Manufacturing and trading companies may extend or contract their dealings, or close up their concerns, as their interest or caprice may dictate. But bridge and turnpike companies are bound to keep their bridges and roads in repair, and to permit the public to use and travel upon them, on payment of the tolls established by law. Indeed, it is upon the plea of public good, or public convenience or necessity, that

lands are taken and private property invaded, under legislative sanctions, for the erection of canals, railroads, turnpikes, and bridges: *Beekman v. Saratoga and Schenectady Railroad Company*, 3 Paige Ch. 45-76 [22 Am. Dec. 679]; *Enfield Toll Bridge Company v. Connecticut River Company*, 7 Conn. 29; and *Rogers v. Bradshaw*, 20 Johns. 742, *per Kent*, Ch.

There is then, in my opinion, no such plain and palpable distinction between such corporations as are instituted for "the acquisition of property," and such as are created "for the public good, or the good of a particular town or society," as will justify the court in allowing to the one and refusing to the other, a course of proceeding unknown to the common law, and at variance with its salutary principles on this subject. This latter remark recalls to my mind another and conclusive argument urged at the bar against the validity of this by-law. The corporation is restrained from making any by-law repugnant to the law of the land. The common law, which requires all votes to be given in person, is a part of the law of the land. The by-law in question is repugnant thereto, and consequently void. It is no answer to this objection to say that such a doctrine would render the clause in the charter authorizing by-laws, and the incidental power of corporations to make them, nugatory. The answer is not true. They may make a by-law, though repugnant to the common law, where the charter, either in terms or by legal implication, contemplates a course of proceeding contrary to the rules of the common law; or where such by-law is essential to carry into effect the legitimate objects of the charter. Besides this, there are many things indifferent to the common law; things which it neither forbids nor enjoins; as, for instance, the time and place of meeting; the mode of transacting business; whether a member shall speak covered or uncovered, standing or sitting; and a thousand other matters that may and must be regulated by the by-laws of the corporation. But whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute, or other special authority, emanating from the creating power, must be shown, to legalize it.

Nor can any argument be drawn, as was attempted at bar, and in the case of *The State v. Tudor*, from analogy between corporations and the law and practice of partnerships and voluntary associations. They may attend to their business in person or by agents, or not at all, as they please. They act in their nat-

ural capacities, and upon their individual responsibilities. But corporations are created by, and amenable to, law; and when partners, or voluntary associations, ask for and accept a charter, they must take it with all its restrictions as well as its benefits. They voluntarily relinquish just so much of their former natural and individual rights and powers as are inconsistent with the expressed, implied, or incidental terms of the charter. Neither is it a satisfactory argument, that if the right of voting by proxy is denied to these private corporations, many of the stockholders may never be able to vote at all. The same argument would extend the privilege of voting by proxy to public and political corporations; and the same thing may happen if proxies are allowed. *Feme-coverts*, infants, and persons *non compos*, can not make proxies; at most, it is an argument *ab inconvenienti*, and is fully answered by the reasoning of the court in the case of *Rex v. Ginever*, 6 T. R. 732. After all, admitting that the practice of voting by proxy is not only convenient, but may be exercised with perfect safety and advantage, both as respects the welfare of the corporation and the security of the public, are we not called upon to do too much, when we are asked, in the absence of any adjudicated case amounting to authority, to establish the doctrine contended for? It is a power that can only be delegated by the supreme authority of the state, and ought not to be extended by judicial legislation. As the law now stands, the legislature can grant the privileges to such corporations as they please, and with such restrictions and limitations as in their wisdom may seem expedient; but if this court undertake, by judicial construction, to extend this right to all private or moneyed corporations, we impose upon the legislature the necessity of inserting a restraining clause in every charter they grant, unless they intend to delegate the right of voting by proxy.

The last, and certainly the most important, though by no means the most difficult, question, remains to be answered, viz.:

3. Are the stockholders entitled to only one vote each, or to a vote for every share of stock they respectively own? This question is not put in reference to the mere matter of election. The right to a plurality of votes, if it exists at all, extends to every subject that may be discussed, and every resolution that may be submitted at any meeting of the stockholders. The by-law does not restrict the right of voting upon shares, to the election of officers; nor did I understand the counsel as confining the rule to that subject. Indeed, it is not easy to perceive

how it can be, or why it should be so limited. If the right exists under this charter, it is a general right, and may be exercised upon every subject. To my mind, the answer to this question is perfectly plain, whether it is considered upon general and common law principles, or upon the terms of the charter itself.

1. Upon general principles. Every corporator, every individual member of a body politic, whether public or private, is, *prima facie*, entitled to equal rights. If for political purposes, every person residing within the chartered limits, and possessing the requisite qualifications, whether rich or poor, is a corporator, and entitled to an equal vote in the administration of its affairs. So, too, if it is a private corporation, *prima facie*, the same parity exists. In joint stock companies, the owner of one share or action of the capital stock is, in general, a member of the company, a corporator; and as such, entitled to, and can not be denied the entire rights and privileges of a member: Angell & Ames on Corp. 62. Those rights and privileges are definite and certain; they can not be greater or different in one member than they are in another. In *Rex v. Ginner*, 6 T. R. 735, the power of making by-laws was delegated by the charter in very comprehensive terms. A by-law giving to the senior bailiff a casting vote in case of a tie, was held to be illegal. So a by-law, imposing an oath of office, where none was required by the charter, was declared to be invalid: *Rex v. Dean, etc.*, 1 Str. 536. So a by-law restricting or extending the right of admission as a member, or of eligibility to office, or prescribing new or additional tests, or qualifications to voters, is illegal: *Rex v. The Wardens, etc.*, 7 T. R. 543; *Rex v. Tupenden*, 3 East, 186; *Rex v. Spencer*, 3 Burr. 1833; *The People v. Tibbels*, 4 Cow. 358; *The People v. Kip et al.*, 4 Id. 382, in note; Angell & Ames on Corp. 192; Id. 182, etc. But the by-law contended for in this case is as obviously a violation of the charter as were those in the cases just cited. The charter, if not in terms, yet in its spirit and legal intendment, gives each member the same rights, and consequently but one vote: whereas, this by-law gives them unequal rights, and an unequal number of votes. It makes one a member for one purpose, and another a member for another purpose. It imposes a test or qualification unknown to the charter, by which to determine how many votes a member may give: whether one, five, ten, or fifty. In short, a by-law excluding a member from office, or from the right to vote at all, unless he owns five, or ten, or twenty shares,



would not be a more palpable, though it might be a more flagrant violation of the charter. A man with one share is as much a member as a man with fifty; and it is difficult to perceive any substantial difference between a by-law excluding a member with one share from voting at all, and a by-law reducing his one vote to a cipher, by giving another member fifty or a hundred votes.

The legislature have thought proper, in some instances, to annex certain and different degrees of rights to certain and different quantities of property; sometimes they have given, by express enactment, one vote for each share, and at other times, they have graduated the number of votes, by giving for each share, not exceeding five or ten, one vote each, and then diminishing the number of votes as the number of shares is increased; but this charter is silent upon the subject, and therefore the by-law is illegal and void.

2. By the very terms of the charter, this question is completely put at rest. The first section incorporates the individuals by name who were then the proprietors of the bridges, thereby conferring upon them severally equal corporate rights and privileges, and making them, collectively, a corporate body. The second section authorizes the company to purchase, and, with the consent of "a majority of the body," to sell real estate, etc. The third section appoints the president, secretary, etc., by name, to continue in office until others shall be appointed in their places "by a majority of the stockholders, at a meeting of the said stockholders;" and then adds, "the said corporation or a majority thereof" may appoint annually, etc. And by the fourth section, the power to make by-laws is given to "the said corporation or a majority thereof."

In the first place, it is obvious to remark, that this charter incorporates certain individuals by name; that they, therefore, and their successors and assigns, collectively constitute "the corporation," "the body," politic and corporate. When, therefore, the second section speaks of the consent of "a majority of the body," what "body" does it mean? The answer is inevitable: "the corporate body," "the body," politic and corporate. But what composes that "body"? The aggregate amount of property? or the collective number of individual proprietors who were incorporated? Manifestly the latter. The corporation property is not, in any sense, "a body" politic. "A majority of the body," then, can only mean, a majority of the individuals comprising that body. The third section is, if

possible, more explicit, and admits of no doubt. The officers named are to continue until others are appointed. How? By "a majority of the stockholders," not by the holders of a majority of the stock. The difference between the two forms of expression is too palpable to admit of illustration. To consider them as meaning one and the same thing would be to confound all language and destroy the use of terms. The distinction is plainly recognized, not denied, by the court, in *Gray v. L. & S. Turnpike Co.*, 4 Rand. 578; Angell & Ames on Corp. 290. But it is said the term stockholders is not used in the general authority subsequently given in the third and fourth sections, to appoint officers, and ordain by-laws. That is true, but the terms used, viz., "the said corporation, or a majority thereof," evidently mean the corporators, or a majority of them, unless the property constitutes the corporation, and not the stockholders.

There is nothing, then, in this charter to change the common law rights and relative influence of the individual corporators. No rights or privileges are annexed by it to any specific or designated quantity of interest. It does not give the election of officers and the control of the property to a minority of the corporators, as the by-law in question may do, and in practice, as it seems by depositions, generally has done. If the charter gave to the stockholders a vote for every share, then they might claim and exercise that right, not on the mere ground of membership, but as a special chartered privilege. It was insisted, however, at the bar, that the legislature recognized the company when the act of incorporation was passed in 1797, with their by-laws and usages as they then existed; that the charter was in the nature of a legislative confirmation of their pre-existing by-laws and regulations, one of which was, that members might vote by proxy, and have one vote for every share they owned. That, therefore, their right to do so is a chartered right. This argument is too broad. If true in its extent, the company could not repeal or modify any of its pre-existing rules. They have, upon this principle, become a part of the charter, part of its fundamental constitution, and can not be changed, unless the charter gives the corporation power to do so. This it does not do. On the contrary, in terms, as well as on general principles, it restrains them from making any by-laws repugnant thereto. It is true, if an ancient or other existing corporation accepts a charter of confirmation, their rights, regulations, and ancient usages will not be superseded or impaired, except so far as the same are altered by, or repugnant to the new

charter: *Newling v. Francis*, 3 T. R. 196; *Rex v. Westwood*, 7 Bing. 1; S. C., 20 Eng. Com. Law, 11, etc. But this is not a charter of confirmation; it is an original charter, creating and giving life to what did not before exist. If, therefore, this corporation has now any by-laws in force on the subject of elections, or in relation to any other matter, it can not be because such by-laws existed prior to the charter, but because the corporation, since its creation, has adopted them, either by a formal act of legislation, or by tacitly conforming to such pre-existing regulations; and in either case their legality and validity are liable to be questioned in this and in other courts of competent jurisdiction. However prudent and advisable, it is not necessary that a corporation should ordain its by-laws by a formal act of legislation, nor that they should reduce them to writing, unless required to do so by the charter: and this is all that is proved by the cases cited on this point: *Angell & Ames on Corp.* 179, etc.; *Union Bank of Maryland v. Ridgely*, 1 Har. & G. 324; *Rex v. Ashwell*, 12 East, 22; and see *United States v. Fillebrown*, 7 Pet. U. S. 28; *United States v. Dandridge*, 12 Wheat. 69.

Neither can the argument founded on the uniform practice and usage of this company, be maintained. It can have no prescriptive rights founded on immemorial usage; and the validity of any other must depend upon the charter. If that is ambiguous, or doubtful, usage may help us to fix the construction, but can not alter its terms or change its fundamental constitution: *Rex v. Miller*, 6 T. R. 268; *Rex v. Varlo*, Cowp. 248, 250; *Rex v. Ashwell*, 12 East, 22; *Angell & Ames on Corp.* 64. Finally: the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the apparent good of the company itself. It is, therefore, void. The object of the legislature was, to give permanency and protection to the public improvement that had been erected, and security to the individuals who had embarked in the enterprise. Instead of promoting and securing these legitimate designs, the tendency, at least, the apparent tendency, of the by-law in question, is to encourage speculation and monopoly, to lessen the rights of the smaller stockholders, depreciate the value of their shares, and throw the whole property and government of the company into the hands of a few capitalists; and it may be to the utter neg-

lect or disregard of the public convenience and interest. I do not say that such was the design, or that such has been the effect; but only, that the natural or probable tendency of the by-law in question is to produce such a result.

If the by-law, allowing votes by proxy and a plurality of votes, had been a legal one, the vote repealing it, or rejecting the proxies, at the time of the election, could not have been justified or sustained; but as the by-law was illegal and void in itself, the proxies and the excess of votes were properly rejected; and the application to set aside the election must be denied. Void things are as no things; this is a universal rule: 22 Vin. Abr. 13, pl. 16, 17; *Cable v. Cooper*, 15 Johns. 157.

I have not reached this conclusion, without the most serious and solemn consideration of the subject; and I may add, not without some reluctance, since a contrary practice has so long prevailed in this company. But my solemn conviction is, that *Ita lex scripta est*. The application must be denied.

FORD, J. The proprietors of the bridges over the rivers Passaic and Hackensack, held a meeting on the third of August, 1833, to elect officers for the corporation, when John I. Plume, James Ewing, Anthony Rutgers, and John H. Stevens, as directors, and Archer Gifford, as secretary, were run upon one ticket, and declared and returned by the inspectors, duly elected, over Anthony Dey, Abraham W. Kinney, Ashbel W. Corey, and Frederick S. Thomas, as directors, and Aaron Beach, as secretary, who were run on an opposite ticket. These latter candidates now come before the court, as complainants, and allege that the proprietors had no such previous notice that an election was to be holden, as is directed by the charter to be given to them; and, moreover, that they, the complainants, did, in fact, receive a very great majority of the votes of the stockholders at said election, and were duly elected, contrary to the return of the said inspectors; wherefore they pray that the election of the persons so returned by the inspectors may be set aside and vacated, and that these complainants may either be declared to be duly elected, or that a new election may be ordered by the court, pursuant to the act of the eighth of December, 1825.

First, they complain, that the stockholders had no such notice of the election, as the charter requires to be given. On referring to the charter, it appears, that the first set of officers was appointed by the legislature, and was directed to continue in office till others should be elected in their places by a majority of the stockholders, to be convened by notice, in writing, for

that purpose, under the hands of any three proprietors; which notice should be served on every other stockholder, either in person, or by leaving it at his place of abode, whether in the state of New York or state of New Jersey, for a certain number of days prior to the time therein specified for said election; and it is objected that no such notice was served upon or left at the abode of any of the stockholders prior to this election. Now, I think it must strike every person, on a plain reading of these provisions, that they were made for that first election only, when the officers that had been appointed by the legislature were to be superseded by the power of the stockholders. They were to remain in office until a meeting should be called by a particular form of notice. This form of notice is prescribed in the charter, for a special case; and the court has not the power to extend it to all cases. It would impose, by construction, an unreasonable hardship on this company forever, when there are no expressions contained in the act to justify it. If the legislature had intended it as a form of notice for all elections, they were able so to express it, and would not have declared it for only a particular case. This stock may be holden by persons scattered, as to their residences, from Buffalo, in the state of New York, to Cape May, in the state of New Jersey, and if notice must be left at the abode of each stockholder so many days prior to every common election, at the peril of its being all void, the expense and oppression would be intolerable. But no such rule is to be found in the charter. After providing for the special case before mentioned, it gives the proprietors a general discretion in a subsequent clause, to this effect: "and also it shall be lawful for the said corporation, or a majority of them, to appoint annually, or at any other time they shall deem proper, a president, secretary, treasurer, and directors, or any other officer or officers they shall judge necessary."

This latter regulation is not limited in its terms, like the former, to a case that is definite and special; but places as well the number of officers, as the times of appointing them, by a general rule in the discretion and judgment of the company. By limiting no time nor description of officers, nor form of notice, for common elections, it left the company at liberty to pass by-laws for regulating such elections as they should judge most convenient to themselves. This construction was put on the charter as long ago at least as the fourth of August, 1821, and how much longer does not appear. At that time, they passed a by-law, requiring notice of all elections to be given a certain num-

ber of days before the time it was to take place, by their secretary, in one newspaper published in New York, and one in New Jersey; and this has been the usage of the company from that time to the present. And although neither usage nor by-law can repeal plain words in a statute, yet where the meaning of the statute is doubtful, usage is a rational guide to its construction: Angell & Ames on Corp. 64. And as notice was given of this election in the manner prescribed in the by-law of the company, and there is nothing in the charter to the contrary, I am of opinion that the stockholders had legal notice of the election.

The second complaint charges the inspectors with having rejected illegally every vote that was given by proxy; and with having allowed to each proprietor only a single vote, instead of as many votes as he had shares of stock. That the inspectors did so is admitted; but whether in doing so they conducted legally or not, under the charter, is the very point in controversy. It is, moreover, admitted, that if the votes so rejected were legal votes, then the complainants had a great majority of the votes of the company in their favor.

The controversy thus stated comprises two questions of law that have no connection, and therefore each one must have a separate consideration. The question presented first for consideration, is, whether the proprietors had a right, under this charter, to vote by proxies. That a majority of them always supposed they had this right, appears undeniably by their originally enacting a by-law, whereby it is declared, "that each stockholder shall have as many votes as he has shares, by himself, or by proxy." This by-law was passed prior to their incorporation, while they existed only as associates; it was therefore not only as old, but even older than their charter; and had always and uniformly been acted on from that time until the election now in question. It is objected that it had never been re-enacted by the corporation since it became a corporate body. But, I apprehend, the action of the company ever since its existence so uniformly, under this law, is sufficient evidence of its adoption by the body. "It seems to be well settled that a corporation may adopt by-laws by its acts and conduct, as well as by an express vote in writing:" Angell & Ames on Corp. 179. In the case of the *Union Bank v. Ridgely*, in the court of appeals of Maryland, 1 Har. & G. 324, this point was expressly so decided. A set of by-laws which had been passed by that bank, while it acted as an association, and prior to its incorporation, was offered in evidence; and upon proof that they had been

acted on, uniformly, by the bank, ever since its incorporation, the court held it to be sufficient evidence of their adoption, although there was no record or minute of the fact. So in *Rex v. Ashwell*, 12 East, 22, a by-law was established upon proof of the invariable usage of it in the corporation, although it was not shown ever to have been adopted in writing. And in the case of *The United States v. Fillebrown*, 7 Pet. 47, it was held that there is no such principle in law as that all corporate acts must be in writing, unless the charter requires them to be so done. I feel constrained by these decisions to conclude that this corporation has had a by-law in full operation ever since its existence, authorizing its stockholders to vote by proxy, if it was in the power of a by-law to confer such a right.

But the power of making by-laws, in all corporations, is laid under very strong restrictions and limitations, not only by the common law of the land, but likewise, and most commonly, in the very charter itself, which constitutes the members a political body. Thus the charter which confers on the proprietors of these bridges a general power "to make such by-laws for their government as they may deem proper," immediately annexes a proviso, in the following very restrictive words: "Provided that they (those laws) be not repugnant to any part of this act, nor to the constitution and laws of this state." If, then, the by-law under consideration be repugnant either to the charter or the law of the state, it is void, by the words of the proviso. If the right of voting by proxy had been granted in the charter, no by-law to the same effect would have been wanted; but the charter is silent concerning it. All it says is, that the proprietors may elect such officers as they deem necessary; but it does not say in what manner the vote shall be given. It is therefore left to be regulated as the corporation may direct by a by-law, provided that by-law be not repugnant to the laws of the state. We come, then, to the great question, does the common law allow any man to vote by proxy? If it does not, then this by-law is repugnant to the common law of the state, and must be held void, under the proviso in the charter.

Now, the house of peers in England is a great body politic, whose members are well known to give their votes, if they please, by proxy; and if they did so by common right, it would be an example of the exercise of this power at common law, and tend very strongly to the establishment of such a principle in all cases; but they do so only in virtue of a special license

from the crown. And as to the house of commons, there are no means by which its members can ever exercise this power: 1 Arch. & Chris. Bl. Com. 168, note 4; and 4 Inst. 12. If, then, this power is denied by the common law to those two of the greatest bodies politic in the nation, with all their rank and dignity, there seems to be no principle on which it can be accorded to inferior corporations. If they have it at all, it must come by express grant of the legislature. No corporation can assume it without such a grant, nor have courts of justice any legal power to confer or allow it.

So long ago as the year 1607, the claim of voting by proxy came up before the court, in the case of *Pemberton v. Allen*, Davis, 42, in ejectment. The bishop of Fernes had demised his ecclesiastical possessions to Allen, the defendant; but it could have no operation by law as a lease, until it should be confirmed by the corporation of the dean and chapter of Fernes. The dean, on going abroad, had appointed one Gray as his proxy, to give his assent to all leases and grants; and Gray had expressed the dean's assent to this lease, under the seal of the deanery. The court held, that it was a rule of the canon law, that a vote could not be given by proxy; *votum dari non potest per literas*; and they decided that the common law agrees with the canon law on this point; "for where a corporation will pass any interest, the common law will not suffer the members of the corporation to give their assent by proctors or substitutes." In proof of this position, a decision is cited as far back as 11 Hen. IV., pl. 64. Now, the interests to be passed upon in this corporation require the judgment of each member; and it seems contrary to all principle, that he should delegate that judgment and trust to another. The proprietors, or a majority of them, under this charter, constitute what may be termed the business board; not merely for electing officers, but for directing every step and measure of the corporation, which, in other charters, is committed to the president and directors. It is by their discretion, that lands for the use of the corporation are, from time to time, to be purchased; and those for which they have no further use, are, from time to time, to be sold and conveyed; that bridges for public use and safety are to be repaired and renewed; that the quality of the material for constructing causeways, is to be decided on; and, in short, it is by their counsels and wisdom that all by-laws are to be enacted; and how can the discretion thus delegated by the charter to each member, be delegated over by him to a proxy?



Long after the foregoing decision in *Pemberton v. Allen*, the same point came before Lord Hardwicke, in 1750, in the case of *The Attorney-general v. Scott*, 1 Ves. 413, and received a like determination. The power of electing a minister for the parish of Leeds was vested in twenty-five trustees, by the decease of two of whom, it had devolved on the remaining twenty-three, and twelve of them constituted a majority. The defendant, Scott, was elected minister of Leeds by this majority, but five of them, instead of voting in person, gave their votes by proxy. Lord Hardwicke declared that there is no instance where a trustee is allowed to make a proxy to vote in a personal trust of this kind; they were to judge of the qualifications of the candidates, and could not delegate that judgment to others, but ought to exercise it themselves; that they might perform a ministerial act by proxy, such as signing the presentation to the ordinary; but election depended on judgment, which must be exercised in person, and not by proxy. These decisions, resting on the great common law principles, that election depends on judgment, and that discretion must be exercised in person, and not by proxy, had set the matter at rest in courts of justice. Those who sought for the privilege of exercising such powers by proxy applied for it to the legislature, who conferred it, as we see in many charters, by special grant, or refused it, as they deemed proper, in each case, and no instance was to be found of its being sanctioned at common law without such special grant, until so late as the year 1812, when the long repose of this question was disturbed in the supreme court of Connecticut, in the case of *The State v. Tudor*, 5 Day, 329 [5 Am. Dec. 162]. Being argued before the nine judges of that court, the bench became divided upon it, but a majority of six against three overturned the principles and decisions of the preceding cases, and decided them the other way. As they do not refer to a single adjudged case, but rely entirely on reasoning and analogy, it is not improper to examine their reasons. It was the case of a corporation for building a bridge, to whom the charter granted power to elect officers, and to enact such laws as they might deem necessary, "not contrary to the laws of the state." The power of voting by proxy was not specially granted, nor even mentioned in the charter, but the corporation had passed a by-law assuming this power, and the court held that voting by proxy was valid under that by-law. They would not give an opinion whether voting by proxy was, or was not, allowable at the common law, because they said they did not consider that question

as being before them; whereas, the most infallible proof of the illegality of any by-law is its being contrary to the law of the state; it is the criterion expressed in the very charter, and in rejecting this test, it appears to me as if they had discarded the charter itself. They meant to test the by-law, they said, by its reasonableness; implying that the law of a minor corporation may be reasonable, and at the same time be insubordinate towards the state, and in conflict with its laws.

It is not in my power to assent to a proposition like this. The first reason they give for its being reasonable, is this, that the legislature had granted this privilege to all the banking institutions in the state; which argument amounts to this, that whatever power banking institutions obtain from the legislature, by a special grant, bridge companies shall have the same without grant; whereas, the argument concludes, in my mind, exactly the other way; that if banking companies can not vote by proxy, without a legislative grant of the right, bridge companies can not do it, for the same reason. The next ground is, that voting by proxy is calculated to enable them to effect the objects of the corporation. The fallacy of this argument plainly appears, to my mind, from its proving too much: it implies that they may infringe upon the laws of the state, if it is calculated to promote their objects; and if so, why not take timber for the use of the bridge, without compensation to the owner; or at their own price, without the expense or delay of an assessment? The only safe rule is, that they must pass no law, and do no act, but in subordination to the laws of the state. It is next argued, that partners in a voluntary association may vote upon their concerns, if they please, by proxy; and from thence it is inferred that the members of a corporation may do the same; not considering that a corporation acts entirely under delegated powers, and that a delegated discretion must be exercised in person, and can not be delegated over again to another. This, likewise, is an argument that proves too much to be sound; for, according to this analogy, voting by proxy would be lawful at town meetings, and by the trustees of universities, colleges, academies, and even parish meetings. The dangerous and novel lengths to which this analogy would stretch the common law, may easily be conceived. Finally, they advert to the distinction between public and private corporations, but do not cite a single instance where voting by proxy has ever been allowed in either kind, at common law, and their reasons seem so exceptionable and inconclusive, that their brethren in the minority had ample grounds

for their dissent, independently of the cases so solemnly adjudged, being all the other way.

But this very question came under the judicial consideration of the chancellor of New York, in the case of *Phillips v. Wickham*, 1 Paige, 590, seventeen years after that case in Connecticut, upon a claim of members to vote by proxy, in a corporation for the draining of certain lands. And the opinion of the chancellor is in harmony with that of Lord Hardwicke, with the court in *Pemberton v. Allen*, and the great principles there mentioned. He held that the right of voting by proxy is not a general right; that a special authority must be shown for it; as in cases of express grant to the stockholders of some moneyed and private corporations; or else, that there must be an express authority to regulate the manner of voting.

Thus, when discretionary power of any kind is delegated to men by statute, the common law requires of them the personal exercise of that discretion, and will not permit them to delegate it to another, to be exercised by proxy. This principle lies at the foundation of all the cases heretofore adjudged (except that in Connecticut), and nothing short of a special grant of the legislature can overcome it. If the common law of the state authorized such powers as depend on judgment and discretion to be exercised by proxy and deputy, then the powers delegated to the judgment of arbitrators, referees, surveyors of highways, chosen freeholders, township committees, overseers of the poor, nay, justices of the peace and judges, might be executed by deputy or proxy. The restraint in these cases rests entirely on the great principle, that power delegated to judgment and discretion must be exercised in person. This principle of the common law does not seem to be denied; but its application to the members of a private corporation is resisted. All the powers they have are delegated to them by the charter; but then it is said, that they own all the stock, and the public having no interest at stake, the members have a right to manage their affairs in their own way. But that the public have no interest at stake in these private corporations, will appear to be a mistake of vast magnitude, if it be considered how vitally these corporations are connected and interwoven with the most important public interests of the state, with the public highways, with the common transportation and exchange of commodities, with paper bills as mediums of currency, and their influence over commerce; with agriculture, with manufactures, with education, and with religion. It is for the promotion of one or another of these

great public objects, that these acts of incorporation have been passed. Knowing the influence they can exercise over these public interests, the legislature, instead of cutting them loose from the restraints of public law, has placed them in the most rigid subordination to it, by declaring in every charter, that they shall do no act contrary to the law of the land. They now seek to exercise powers which are delegated to their discretion by deputy, which the law of the land has universally prohibited. If we bend the law to them, we must bend it to all others; there is no stopping-place at which we can refuse; but we have no right to stir a pebble of the common law. If the corporation really need this power, they must ask it of the legislature. They can not assume it, nor can the court confer it.

In the second place, it is objected that the inspectors allowed only one vote to each proprietor, although he was entitled, under a by-law of the company, to as many votes as he had shares of stock; and although this by-law had been in force, and in constant use, from the commencement of the charter. When this subject had been fully discussed by both parties in the company, the inspectors were of opinion that the by-law in question was contrary to the charter, and therefore they restricted each proprietor to one vote. It can not be denied, that a by-law contrary to the charter is void from the beginning; and that, as to usage, it can never alter or repeal a statute; otherwise, usage would be superior to the power of the legislature; and the usages of corporations could never be restrained within the limits prescribed to them. It is true, that when the words or clauses of a statute are ambiguous, or so uncertain, that recourse must be had to construction, courts of justice will, for the most part, give to them that meaning which long usage has ascribed to them, rather than the contrary; and this is the whole office of usage. But where the legislature uses clear and plain words, courts of justice will never suffer them to be set aside, either by usage or construction. This claim of having one vote for each share, neither rests on the common law of the land, nor any of its principles. It wholly depends on the grant of the legislature. By some charters, it is specially granted, thus showing that the legislature know how to confer such a power, when they chose to confer it; while other charters confer it not, and as plainly show, that such a grant was not intended. But in vain we look into this charter for any grant of the kind, and therefore, the conclusion is inevita-

ble, that it does not exist. This is so decisive, that it seems to preclude all necessity of further argument.

But the claim can not consist with other provisions in the charter. Thus it forms the proprietors into a common council, and confides to their discretion, not only the election of officers, but the whole management of corporate business, in all its departments and branches; and the president and directors, as this charter is constituted, are only ministerial agents, to execute their resolutions; and there is not a word in the charter that gives any superiority to one member over another in council. It names the first twenty-six proprietors, by their christian and surnames, with the most entire equality, and gives to a majority of them, and their successors, the joint powers of the corporation.

Wherever a statute names commissioners, or a majority of them, to perform any duty, and makes no distinction among them, the word majority necessarily means a majority of the persons who compose the commission. It makes them co-equals in such appointment, and excludes every ground of claim for priority of one over another, whether founded on age, or wealth, or shares, or seniority in office. This principle of equality of powers, among such as are appointed by statute to the exercise of a trust or performance of duties, is of the most universal obligation. It is this which maintains an equality of power and responsibility among the surveyors appointed for the highways, the members of the board of chosen freeholders, overseers of the poor, and even the judges of the courts of common pleas, and of sessions; the law which appoints several persons as joint agents, to perform any trust or duty, makes them to be all equal in the power so conferred. These proprietors hold under the charter by one common appointment, which makes them equal as in all other cases; and a by-law which destroys their equality in executing the high trusts committed to them, by giving to some of the members twenty times that power, in council, that it allows to others, and that changes this trust by taking it away from persons, and vesting it in shares, is a direct contravening of the charter by which they were bound. The statute plainly ordains, that the proprietors shall express the corporate will by a majority of opinions; it supposes each proprietor or stockholder to have a free will, and makes a majority of those wills to be the will of the corporation, and any by-law running counter to this plain statute, is manifestly a violation of it. It gives to some members additional votes, when by the

charter they have but one. In *Rex v. Ginever*, 6 T. R. 732, a majority of bailiffs and aldermen had power by charter to elect a certain officer, and they passed a by-law, that if their voices happened to be equal, the senior bailiff should have a casting vote. The court held that this by-law was a violation of the charter, for if they could give one member a vote, not given by statute, they could give him six, or any other number.

The offices now in question excite but little interest among these litigants on either side; but the principles affect all corporations. The powers of a vote for every share, and of giving those votes by proxy or deputy, are conferrable only by the legislature; they are not common-law powers, and therefore the court can not sanction them on common-law principles. According to my understanding of the common law, there was no error in conducting this election, and the motion to set it aside must be refused.

RYERSON, J., gave no opinion, as the cause was argued before his appointment.

Application refused.

VOTING BY PROXY.—By the common law all voting was required to be done in person. The only exception to this rule was in the case of the peers of England, who were, by license obtained from the king, allowed to make other lords of parliament their proxies to vote for them in their absence: 1 Bl. Com. 168; Angell & Ames on Corp., sec. 128; *Phillips v. Wickham*, 1 Paige, 590. Chancellor Walworth, delivering the opinion in that case, said: "The right of voting by proxy is not a general right, and the party who claims it must show a special authority for that purpose. The only case in which it is allowable at the common law is by the peers of England, and that is said to be in virtue of a special permission of the king. And it is possible that it might be delegated in some cases by the by-laws of a corporation, where express authority was given to make such by-laws regulating the manner of voting. I am not aware of any other case in which the right was ever claimed; and the express power which is generally given to the stockholders of moneyed and other private corporations, is opposed to the claims in this case, where there is no express or implied power contained in the act. I therefore think the decision of the inspectors correct in rejecting the votes offered under the proxies."

There never has been any doubt that in all cases of elections in public and municipal corporations, and in all other elections of a public nature, every vote must be personally given: 2 Kent Com. 294. But on the question, whether or not the stockholders in a purely private corporation have the right to vote by proxy, there has been some difference of opinion: *Brown v. Commonwealth*, 3 Grant Cas. 209; *State v. Tudor*, 5 Day, 329; S. C., 5 Am. Dec. 162; *People v. Crossley*, 69 Ill. 195; *People v. Twaddell*, 18 Hun, 427; 2 Kent Com. 295, note (a); *Field on Corp.*, sec. 72. In the case of the *State v. Tudor*, a distinction was drawn between incorporated societies, whose object is the acquisition of property, and private corporations of every other kind,

and the court decided that a by-law of a corporation of the former kind, authorizing the stockholders, in all their meetings, to vote by proxy, was a valid by-law, notwithstanding the fact that there was no clause in the act of incorporation that empowered the members of the company to vote by proxy.

In *Brown v. Commonwealth*, it was decided that shareholders in a private corporation could not vote by proxy without a special provision in their charter permitting them to do so. Lewis, C. J., delivering the opinion of the court in that case, said: "But it seems reasonable to hold that in a case where the shareholders are embarked in a common enterprise, and where the vote of each affects the interest of all the others in the management of the concern, the election of directors shall take place under circumstances favorable to a consultation with each other, so that they might have the benefit of each other's views and information relative to their common interest. This can only be done by requiring the stockholders to be present when voting." In the *People v. Crossley*, on the other hand, it was decided that the by-law of a private corporation, authorizing its members to vote at all elections, either in person or by proxy, was valid, and not inconsistent with the constitution and laws of the state of Illinois. Mr. Justice Sheldon, who delivered the opinion of the court, after referring to the doctrine of the principal case, said: "The contrary was decided in *The State v. Tudor*, 5 Day, 329, in relation to private corporations for the transaction of private business, like the one here. The rule of the latter case appears to be one promotive of convenience, and has to recommend it that it allows members of a private corporation, instituted for merely private purposes, to regulate their manner of voting in a way to suit their own sense of convenience and interest. In view of the statutory authority to elect the directors in such manner as might be specified in the by-laws of the society, we are disposed to concur with the latter authority above cited, and hold the by-law authorizing the voting by proxy in elections to be valid, especially so, in view of sec. 3, art. 11, of the present constitution of the state, which directs that 'the general assembly shall provide by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares,' etc. Whether or not this provision may be considered as applying to a corporation of this character, it is a constitutional expression in favor of the policy of voting by proxy in private corporations, which may well be regarded and given heed to in determining the present question. We do not think it can be said that the by-law in question is inconsistent with the constitution and laws of this state." While in a note to 2 Kent Com. 295, it is said, referring to the principal case: "The authority of the case of *The State v. Tudor* may, therefore, be considered as essentially shaken." And in *The People v. Twaddell*, 18 Hun, 427, it was decided that a member of a corporation is not entitled to vote by proxy, unless he is, by law, specially authorized so to do.

It will be seen that, where the matter is not regulated by statute, it is somewhat difficult to determine how the courts would decide the question under consideration. The determination of the question is, however, of but slight practical importance in this country, as the legislatures of nearly every state in the union have, by express enactment, provided that the stockholders in private corporations may at all meetings thereof vote either in person or by proxy appointed in writing: Comp. Laws of Arizona (1877), p. 515, sec. 7; Civ. Code Cal., sec. 307; Rev. Stats. Col., p. 119, sec. 5; Gen. Stats. Conn. (1875), p. 279, sec. 11; Laws of Del., p. 376, sec. 2; Const. Ill., art. 6, sec. 3; 1

Rev. Stats. Ind. (1876), p. 620, sec. 4; Comp. Laws Kan. (1879), p. 22, sec. 27a; Rev. Stats. Me. (1871), p. 394, sec. 5; Rev. Code Md. (1878), p. 321, sec. 52; Gen. Stats. Mass. (1860), p. 304, sec. 33; 1 Comp. Laws Mich. (1871), p. 1148, sec. 2; Gen. Stats. Minn., p. 450, sec. 160; Rev. Code Miss. (1871), p. 530, sec. 2406; 1 Wagner's Stats. Mo., p. 289, sec. 1; 2 Comp. Laws Nev., p. 274, sec. 5; Gen. Stats. N. H. (1867), p. 280, sec. 21; Revn. N. J. (1877), p. 181, sec. 21; Gen. Laws New Mex. (1880), p. 204, sec. 5; 2 Rev. Stats. N. Y. (1875), p. 400, sec. 6; 1 Rev. Stats. Ohio, sec. 3245; Gen. Laws Oregon, p. 526, sec. 7; Purdon's Dig. Pa., p. 744, sec. 4; Gen. Stats. R. I., p. 291, sec. 3; 1 Stats. Tenn. (1871), sec. 1404; Gen. Stats. Vt. (1862), p. 635, sec. 4; Code Va. (1860), p. 332, sec. 10; 1 Rev. Stats. W. Va., p. 316, sec. 44. In some of the states the right to vote by proxy is limited by various restrictions. Thus, in New York the right is granted "subject to the provisions of the act of incorporation;" 2 Rev. Stats., p. 400, sec. 6. And it is enacted, 2 Rev. Stats., p. 668, sec. 70, that "no member of any mutual fire insurance company organized under the laws of this state shall be allowed to vote by proxy for a director or directors of any such company."

In Pennsylvania, it is provided in elections for bank directors, that "stockholders may vote by proxy, duly authorized by writing, if dated within thirty days; but no officer, clerk, teller, or book-keeper of the bank shall act as proxy;" Purdon's Dig. Pa., p. 81, sec. 15. And the power to vote by proxy in any association incorporated by any authority in that state is regulated by a special act passed for that purpose: See Purdon Dig. 819. And the statute of New Hampshire provides that, except in railroad corporations, "no stockholder shall act as proxy for any other stockholder, nor shall any person act as proxy for more than one stockholder, or vote as proxy for shares exceeding one eighth of the whole capital stock. No proxy shall confer the right to vote at more than one meeting, which shall be named therein;" Gen. Stats. N. H. 1867, p. 280, secs. 21, 22.

In *Hoppin v. Buffum*, 9 R. I. 513, it was decided that a pledgor of stock which stood on the books of the corporation in the name of the pledgee, might, by suit in equity, compel a transfer to him, or oblige the pledgee to give him a proxy to vote. And in *Vowell v. Thompson*, 3 Cranch C. C. 428, the court held that the mortgagor of stock was, until foreclosure and sale, entitled to vote, and accordingly decreed that the defendant should give to the plaintiff a power of attorney to vote upon the stock, until it should be sold under the mortgage or deed of trust.

At an election for directors of a corporation, the inspectors of election have no power to try and determine the genuineness of the proxies offered to be voted upon. If the proxy is apparently the act of the stockholder, and regular upon its face, that ends the matter so far as the inspectors are concerned: *In the Matter of Cecil*, 36 How. Pr. 477.

In *Reed v. The Bank of Newburgh*, 6 Paige, 337, it was decided that a stockholder who had given to another a proxy to vote upon his stock, even for a valuable consideration, was justified in revoking the proxy where it was about to be used for a fraudulent purpose. And in *Campbell v. Poultney*, 6 Gill & J. 94; S. C., 26 Am. Dec. 559, it was held that an injunction lies to restrain voting by proxy in fraud and violation of a bank charter.

In *The Matter of the Mohawk and Hudson R. R. Co.*, 19 Wend. 135, it was decided that where the statute required stock to be voted upon in the name standing on the transfer book, either in person or by proxy, if stock stood in the name of a person described as cashier, a proxy from him must be produced, and that a proxy from his successor as cashier was not sufficient.

In *The Matter of Barker*, 6 Wend. 509, it was held that an alien stock-



holder could not vote by proxy when by the terms of the act of incorporation of the company the right to vote was given to each stockholder being a citizen.

Field, in his work on corporations, section 72, in discussing the right of stockholders to vote by proxy, says: "There is usually a provision in the articles of association, that the members may be represented in the corporate meetings by an agent or proxy duly constituted. In such cases the personal attendance of the member at a general meeting is unnecessary, but the votes which a principal would be entitled to cast, if personally present, may be cast by his duly constituted agent. But the right of proxies to vote, as well as the manner of voting in moneyed corporations, is usually provided for by the articles of association, or by the by-laws duly adopted in accordance with such articles, they constituting the guide and authority in this matter. When the constituting instruments provide for the right of voting by proxy, that settles all questions relating to the subject. And it is generally so provided in case of corporations for pecuniary gain."

The principal case was cited in *Bailey v. R. R. Co.*, 22 Wall., 635, to the point that the question, whether dividends in stock necessarily entitle the holders to additional votes, depends on the certificate of stock and the charter of the company; and in *Pulford v. Fire Department of Detroit*, 31 Mich. 466, to the point that all by-laws contrary to the general principles of the common law, or the policy of the state, are void.

BY-LAWS, POWER OF CORPORATION TO MAKE.—See *Commonwealth v. Woelper*, 8 Am. Dec. 628; note, 640; *St. Luke's Church v. Mathews*, 6 Id. 619; note, 629.

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## PERRINE v. BERGEN.

[2 GREEN LAW, 355.]

ACTUAL POSSESSION OF LAND MAY BE DELIVERED to a person by the sheriff, under a writ of possession, although the land was, at the time of the delivery, covered with water.

CASE for overflowing plaintiff's land. The opinions state the case.

FORD, J. This was an action on the case for overflowing a part of the plaintiff's land with water by means of a dam that the defendant maintained across a stream of water below the plaintiff's lot. The declaration counted on the plaintiff's possession of a lot of two acres and seventy-nine hundredths, and that the defendant caused one acre and seventy-two hundredths thereof to be overflowed. The defendant admitted the overflowing complained of, but denied that the plaintiff had title to the land, or any such possession that he could maintain an action for overflowing it.

The plaintiff gave in evidence a survey and location of the two acres and seventy-nine hundredths in the year 1808, and deduced title under it to himself. Soon after the location he

brought an ejectment against one Valley Cousins, the tenant in possession, and having obtained judgment and a writ of *habere facias possessionem*, the sheriff, as appeared by the record and return, put him in full possession, the twenty-ninth of October, 1810; from which time, by himself and tenants, the plaintiff continued his possession till the commencement of the present suit in September, 1829, making a period of nineteen years. Such was the possession he proved.

On the other hand, it appeared that the defendant's dam occasioned water to stand on the low parts of the said lot, both before and at the time the sheriff delivered possession to the plaintiff, and has occasioned it to do the same ever since; and in this way the defendant had possession as much as the plaintiff during those nineteen years, as his counsel insisted.

The court, in charging the jury, instructed them that an actual possession must be shown by the plaintiff to maintain this action, and as he had not made that out, the jury might reject his possession altogether. This direction, I conceive, was erroneous; it supposes the sheriff not to have delivered actual possession of that part of the lot on which the water was standing; whereas I consider it an actual possession that was delivered, and that the water did not prevent its being so. The judgment in ejectment must certainly be executed, and if this was not actual possession, on account of water being on the land, it would be impossible, in such a case, to execute a judgment, and the law would have to be acknowledged impotent. The sheriff was not bound to drain the land. To do that deed, he must have entered on the defendant's land and prostrated his dam. He therefore gave to the plaintiff the actual possession of the premises, the land and the water both.

An idea seems to be entertained, that if the defendant overflowed the freehold of an owner, higher up the stream, it gave him possession of the land he so overflowed, and ousted the owner; but if this can be construed an ouster, it follows that an ejectment may lie for overflowing land; which is not only unheard of, but would be without effect, even after a judgment. All he could recover would be the land with the water on it: the injury would still be unredressed.

So far from being any ouster, it is not even a trespass to flow the land of another with water, by erecting a dam below his land; for the act, in itself, is lawful. Every man may build a dam, by common right, on his own land; and trespass never lies when the act is lawful in itself, and injurious only in its consequences.

A man who fixes a spout to carry the water away from his house, performs a lawful act on his own premises; but if it shed the water upon the roof of his neighbor's house, or into his yard, he must be answerable for the injurious consequences in an action on the case, but an action of trespass will not lie against him: *Reynolds v. Clark*, Stra. 634.

It is, therefore, no dispossession, no ouster, nor even a trespass, to flow water backwards on another person's land; it is denominated in law a nuisance, an annoyance to the tenant in possession; and his only modern remedy is, by an action on the case, founded on his possession. It is not in the nature of a nuisance ever to work a dispossession of the tenant, if it be the consequence of a lawful act; as if one erect a smelting-house or a sty on his own land, so near to another man's house as that it incommodes his dwelling by the gas of the former, or nauseous smell of the latter, the annoyance is neither an ouster nor dispossession of the owner, nor will an ejectment or trespass lie for the injury; it is a nuisance the remedy for which is only by an action on the case: 3 Bl. Com. 220.

If such a nuisance, whether by smelting-house, hog-sty, or raising backwater, has been continued in the same manner, peaceably and without interruption, twenty years, it thereby ripens into a right, and then it takes, in law, the name of an easement; but even an easement works no dispossession of the owner; the possession still remains in him as much as if the easement did not exist. Thus, if the public have a highway over any man's land, or if an individual have a private way over it, such easements of theirs impair not the owner's possession; he may maintain trespass for digging the soil of such highway, or even private way, which shows the possession is his as much as if such easements were not in existence. Therefore, whether it be a nuisance or easement, it does not impair the possession of the owner of the land; he remains as entirely in the actual possession as if such nuisance or easement were not in being. Of consequence, the direction given to the jury was evidently a mistake. The sheriff delivered to the plaintiff actual possession of the whole premises mentioned in the writ of possession, whether drowned by water or not. If the defendant's dam continued to drown it the nineteen years afterwards, it may have annoyed the plaintiff, but did not diminish his possession. Without touching other points involved in the cause, I am of opinion, on this ground alone, that there ought to be a new trial, and let the costs abide the event of the suit.

RYERSON, J. This is a motion to set aside a verdict rendered for the defendant, and grant a new trial in an action on the case for overflowing the plaintiff's land by means of a mill-dam erected below the dam, many years ago, by another person, but kept up and maintained by the defendant. The plaintiff counted on his possession and seisin. The defendant pleaded not guilty. On the trial it appeared that the plaintiff made an appropriation of the land in question, two seventy-nine one hundredths acres, the twentieth of April, 1808, as of vacant land, by a survey and return thereof, in due form, in the name of Matthew Perrine; that he recovered judgment in an action of ejectment for the same lands, against the person in possession, in September term, 1810, and before November term following, took possession thereof, under a writ sued out of this court. It further appeared that the title of Matthew Perrine was duly transferred to the plaintiff; so far, at least, as was necessary to support this action, if that title could enable him to support it. During all this time, and down to the bringing of the present action in the year 1829, a part of the land in question was overflowed in the manner complained of, except at short intervals, and no change had been made in the possession since 1810.

On the part of the defendant, it was insisted that the plaintiff had not the possession or any title to the lands alleged to have been overflowed. It appeared that a prior location, or appropriation of the premises in question, had been made by patent, as long ago as 1690. But the title thus acquired was not traced to any person after the year 1700. Nor did the defendant show in himself, or his grantor, any title, or any possession, other than as hereinafter and above specified. That is what resulted from the act of overflowing, and a proprietary location made in the year 1809, younger than that of the plaintiff, and therefore inoperative, and which was moreover in no manner assigned to the defendant. It also appeared that a negotiation had for some time existed between the plaintiff and one Anderson, who held the premises till within a few years, and under whom the defendant claims for a transfer of title of the *locus in quo* to Anderson from the plaintiff, and that Anderson had disclaimed any right to the premises, or to flow the same, as against the plaintiff. And when the defendant purchased he was expressly told by Anderson that he could give him no title for this slip of land; but that he, the defendant, must purchase the same of the plaintiff.

According to the report made to us of the charge to the jury by the judge who tried the cause, he "seemed to dispose of the written and documentary title of the parties, respectively, without making any account of either, and placed the cause before the jury on the question of the plaintiff's possession, and the injury thereto by the defendant." If the jury believed, from the evidence, that the plaintiff was possessed of the premises (which possession must be an actual possession at the time the injury was committed), and that the defendant had done the injury thereto, then they should find for the plaintiff the amount of the damages proved; if not, they were to find for the defendant.

The application now made to the court is upon the grounds, "that the judge, in his charge, erred in law; and that the verdict was against law and evidence."

I am of opinion that if by "actual possession" in the charge, anything more was intended and communicated to the jury than such a possession as the plaintiff might have in the *locus in quo*, notwithstanding it was overflowed by another in the manner in this action complained of and proved, the charge was erroneous in law; otherwise this action upon a count, upon the possession merely, could never be maintained. And if the charge does not mean more, the verdict of the jury is contrary to the evidence in the cause, which shows that the plaintiff, by his entry, under a proprietary location, and a judgment and writ of possession in ejectment, had all the actual possession of which the *locus in quo* was susceptible, while the nuisance complained of continued. In this point of view, I am inclined to think the written and documentary title of the plaintiff was important, as tending to show the extent and bounds and character of his possession, and ought not to have been laid out of view without making any account thereof; though upon this point I do not intend to give any conclusive opinion.

I am therefore of opinion, without considering the other matters involved in this case, that the verdict should be set aside and a new trial granted.

The costs to abide the event of the suit.

CASES  
IN THE  
COURT OF CHANCERY  
OF  
NEW YORK.

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GATES v. GREEN.

[4 PAIGE CH. 355.]

**A LESSEE OF PREMISES WHICH ARE BURNED** has no relief, either at law or in equity, against an express covenant to pay the rent, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild.

**REFORMING LEASE.**—Where, on a release of the premises, the lessor engages by parol to insert in the lease a provision that the rent should cease if the premises were casually burned, which provision is inadvertently omitted, an injunction will lie on behalf of the lessee to restrain the lessor from proceeding at law to recover the rent subsequent to the burning of the premises.

**BILL** for an injunction. Green having leased the premises in question in January, 1826, to one Cossit, for a term of three years, and being notified by him that he desired to surrender his lease, wrote to his agent, Strong, that he would accept the surrender if another lessee could be procured, with good security. Gates applied for the lease, and it was agreed between Gates and the agent that he would insert in the lease a special provision that the rent should cease if the house should be burned down by casualty during the term. The agent, an attorney, accordingly drew the lease, but omitted, through inadvertence, to insert the special covenant; nor was the omission discovered until the casual destruction of the building by fire in December, 1827. After the burning of the house Gates offered to pay the rent up to January, 1828, and to surrender the lease, but the defendant, refusing to accede to these terms, brought an action at law for the rent for the entire term, which action this bill in equity sought to enjoin.

*G. C. Bronson*, for the complainant.

*J. A. Spencer*, contra.

The CHANCELLOR. It appears to me a principle of natural law, that a tenant who rents a house or other tenement for a short period, and with a view to no other benefit except that which may be derived from its actual use, should not be compelled to pay rent any longer than the tenement is capable of being used. By the law of Scotland, upon the hire of property, a loss or injury to such property, which is not caused by the fault or negligence of the hirer, falls on the owner. And the lessee is entitled to an abatement of the rent, proportioned to any partial destruction of the subject: 1 Bell Com. 452. The Napoleon code also declares, that if the thing hired is destroyed by fortuitous events during the continuance of the lease, the contract of hiring is rescinded; but if it be only destroyed in part, the lessee may, according to circumstances, demand either a diminution of the price or the rescinding of the lease itself: CodeNap., art. 1722. And the same provision substantially is found in the civil code of Louisiana, art. 2667. The learned commentator on the law of nature and of nations, also considers this a plain principle of natural law. And he refers to a law of Sesostris, an Egyptian king, that if the violence of the river should wash away a part of the land, the tenant should be proportionably abated in his rent: Puff., b. 5, c. 6, sec. 2. The same principle has also found its way as far north as Newfoundland; where, by the custom of that country, the tenant of a building may surrender his lease, and be excused from the further payment of rent, in case of a casual destruction of the building by fire: See *Broom v. Preston*, Sel. Cas. ; S. C., Newf. 491. And Rutherford, in his lectures on natural law, makes a very sensible distinction between a casualty which destroys the value of the use of the property, which loss naturally falls on the lessee, and one which destroys the property itself, of which the lessee has hired the use. In which latter case he holds that the lessee is excused from the payment of further rent: Ruth. Inst. 127. The cases of *Harri-son v. North*, 1 Ch. Cas. 83; *Brown v. Quiller*, Ambl. 619; *Campden v. Morton*, before Lord Northington, Serg. Hill's M. S., and *Steel v. Wright*, before Lord Apsley, in 1773, 1 T. R. 708, note, also show that some of the English chancellors struggled hard to introduce this principle of natural law into the administration of justice in their courts. A contrary principle, however, finally prevailed in the equity courts of England, as well as in the

courts of law. And it must now be considered as settled, both in England and in this state, that a lessee of premises which are burned has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild: 3 Kent Com. 466. Although the law is thus settled, I have, however, thought proper to refer to the opinions of these distinguished judges and civilians, and to the laws of other countries, for the purpose of showing that the defendant in this case has no natural equity to entitle him to rent for these premises, after the destruction of the buildings which constituted their only value to the lessees. And if the lessees did not in fact make an agreement to pay the rent, in the event which has occurred, that they are entitled to relief.

It is established beyond all question, that there was an express agreement between the lessee and the agent of Green, that the rent should cease if the building should be casually destroyed by fire; and that a covenant or stipulation to that effect should be inserted in the lease. The answer of the defendant, setting up a specific agreement as having been entered into between himself and Gates at the time he called upon him as to the repairs, is not responsive to the bill, and is not supported by the proofs in the cause. Indeed, it is hardly consistent with the defendant's own letters, to suppose any valid or binding agreement was made, or was intended to be made, by either party at that time. It was at most a mere proposition for an agreement, which was *in fieri* until the final consummation thereof with the defendant's agent, when he undertook to prepare the lease. Until that time, Colvin was certainly not a party to any agreement. He can not, therefore, be bound by any other agreement than that which he supposed was contained in the written lease when he executed the same. He certainly was not aware of any want of authority in the agent to make such a lease; and he was expressly informed that the lease contained a stipulation which would exempt him from liability for the rent in the event which has happened. If the agent exceeded his powers, and made an agreement which he was not authorized to make, the principal must either repudiate the lease altogether, or he must consider himself bound by the stipulations in the favor of the other party, which should have been contained therein. The lessor can not be permitted to affirm so much of the agreement as was for his own benefit, and to disaffirm so much as provided for the protection of the rights of the other



parties. It is hardly probable that Gates would have entered into such a covenant as was contained in the lease to Cossit, which would not only have rendered him and his surety liable for the rent in case of the loss of the building by fire, but would also, in that case, have compelled them to rebuild the house at their own expense. For the exception which is contained in the covenant to repair, in this lease, is not found in the lease to Cossit. And it is evident, from the testimony, that Colvin would not, knowingly, have entered into an agreement which would have rendered him liable to that extent.

The vice-chancellor was wrong in supposing these complainants were bound in equity to perform an agreement which they never made, or intended to make, because Strong had exceeded his authority in accepting a surrender of the former lease to Cossit. If that act was unauthorized, the defendant must seek his remedy, if he has any, against Cossit and his surety, under the covenants in the original lease, or against the agent who has received a surrender of that lease improperly. But if he elects to ratify the act of his agent as to this lease, he must ratify it fully, and must make the written agreement what it was supposed to be by the complainants, and his agent when they executed the same.

The decree of the vice-chancellor must be reversed, and the lease must be delivered up and canceled; Green must be perpetually enjoined from prosecuting any suit or proceedings for the collection of the rents which have accrued subsequent to the burning of the house. And as he has been carrying on an unjust and inequitable controversy with these complainants, after he had full knowledge of their equitable rights, and after they had offered him more than he had any just right to claim, he must pay to the complainants their costs in this suit.

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THE DESTRUCTION OF THE LEASED PREMISES BY FIRE does not discharge the lessee from his obligation to pay rent in the absence of any agreement to that effect: *Hallett v. Wylie*, 3 Am. Dec. 457, and similarly in *Pollard v. Schaafer*, 1 Id. 236. The proposition is regarded as settled in New York by the principal case, among others, and has been frequently reiterated on the authority of *Gates v. Green*; *Allen v. Culver*, 3 Denio, 294; *Graves v. Berdan*, 26 N. Y. 502, in Judge Wright's dissenting opinion; *Willard v. Tillman*, 19 Wend. 360; *Wood v. Hubbell*, 10 N. Y. 487, where one phase of the question was presented as indicated by the following language: "It remains to consider whether the tenant is liable on an express covenant for rent where the premises leased are destroyed by fire between the time when the lease is executed, and that when the term commences and before the tenant ever had the actual possession. The cases which hold that the tenant is liable after the destruction of the buildings by fire, upon his covenant for rent, are all

cases where the tenant had entered under his lease, and the term had actually commenced before the fire. Such was *Hallett v. Wylie*, 3 Johns. 44 [3 Am. Dec. 457]; *Mark v. Cooper*, 2 Stark. 763. And this is assumed to be the case in every instance where the doctrine has been advanced, even where the fact is not expressly stated." The injustice of the general doctrine, as shown by the opinion expressed in the principal case, occasioned legislative consideration of the matter, and the enactment, in 1860, of an act discharging a tenant from the payment of rent after the accidental destruction of the premises by fire, and terminating the lease: *Doupe v. Genin*, 37 How. 9; S. C., 1 Sweeny, 31.

THAT A LEASE WILL BE REFORMED WHERE A CLAUSE HAS BEEN OMITTED by mistake was determined in *Wilson v. Deen*, 74 N. Y. 536; *Wood v. Hubbard*, 10 Id. 486, on the authority of the principal case.

## BANK OF UTICA v. CITY OF UTICA.

[4 PAGES OBL. 399.]

**MANDAMUS** TO COMPEL COMMON COUNCIL TO CORRECT an assessment and taxation when illegal, will lie where the city charter gives to the common council the exclusive control as to assessing and collecting the city taxes.

**WHERE THE ILLEGALITY APPEARS ON THE WARRANT** for the collection of taxes, an adequate remedy at law lies by an action at trespass, should the payment of the tax be attempted to be enforced by a sale of the property.

**A COURT OF CHANCERY WILL NOT REFUSE TO TAKE JURISDICTION** of a case merely on the ground that the complainant has a perfect remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection.

**THE PERSONAL PROPERTY OF A BANK SUBJECT TO TAXATION** is so much of the capital stock paid in or secured as will remain after deducting therefrom the actual cost of all the real estate of the company.

**BILL**, with stipulation waiving all objection to form and jurisdiction, filed for the purpose of settling the city's right to tax seventy thousand dollars remaining in the bank over and above the capital stock of the company. By the assessment roll it appeared that the bank was assessed for all its real estate lying in the city, and for its whole capital stock, except so much thereof as had been paid for real estate then held by the company in Utica and elsewhere; and also for seventy thousand dollars which was described in the assessment roll as "other personal property, or surplus fund." The amount of the tax imposed on account of this fund was two hundred dollars.

*H. Denio and W. Hunt*, for the complainants.

*Charles A. Mann*, contra.

**THE CHANCELLOR.** As the charter of the city of Utica gives to the common council of that city the exclusive control and direction as to the assessment and collection of the city taxes, I think the complainants had a perfect remedy at law, by an application to the supreme court for a mandamus, to compel the common council to correct their assessment and taxation of the property of the bank, if it was illegal. The remedy by mandamus, however, would be much more imperfect and doubtful, in the case of an ordinary town and county tax, where the assessment is made by one body, and the tax is imposed by another; especially if the error or illegality did not appear upon the face of the assessment roll. In the present case, the illegality, if any, appears on the warrant which has been issued by the common council of Utica, for the collection of the tax. The complainants, therefore, appear to have another adequate and more certain remedy at law, by an action of trespass, should the defendants attempt to enforce the payment of the tax by a sale of the property of the bank. This court, however, will not refuse to take jurisdiction of a case merely on the ground that the complainant has a perfect remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection: 2 Paige, 509. By the written stipulation between the parties, for the purpose of bringing this question before the court for a decision upon the complainants' bill alone, the defendants have expressly agreed to waive the objection, that there was a certain and adequate remedy at law, for the complainants, if the construction of the statute is as contended for by them. And in this case there can be no doubt as to the power of the court, if it takes jurisdiction of the cause, to give a perfect remedy to the complainants, by the ordinary decree, for a perpetual injunction against the collection of this tax. Finding myself thus legally compelled to apply the maxim, *modus et conventio vincunt legem*, even to a question of jurisdiction, I shall proceed to examine and decide this case upon its merits.

There is no doubt as to the right of the common council of the city of Utica, under the forty-fourth section of the charter, to impose a city tax on the real and personal estate of a moneyed corporation located in that city, which tax is to be imposed upon the same property that the board of supervisors of the county of Oneida are authorized to tax for town and county expenses: Laws of 1832, p. 26. Reference must therefore be had to the provisions of the general tax law, as contained in

the thirteenth chapter of the first part of the revised statutes, to ascertain what property is thus taxable.

By the first section, 1 Rev. Stat. 387, it is declared that all lands and all personal estate, within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to certain exemptions specified in a subsequent clause of the statute. This section of the statute taken by itself, would, of course, include all the personal estate of a corporation, beyond the amount of its debts, whether more or less than the amount of its nominal capital. The subsequent provisions of the statute, however, show what the legislature mean by the term personal estate, when applied to incorporated companies liable to taxation on their capital. It means so much of the capital stock paid in, or secured, as will remain after deducting therefrom the actual costs of all the real estate of the company. The regulations as to the assessment of incorporated companies appear to be all contained in the fourth title: 1 Rev. Stat. 414. The first section declares what corporations shall be liable to taxation on their capital, and by a previous provision all others are exempt from taxation on their personal estates. The second section directs the proper officer of the company to furnish to the assessors of the town or ward where it is liable to be taxed upon its capital, a statement of the amount of its capital paid in or secured, the amount of the same which is invested in real estate, at the actual cost of such real estate, and the amount of the capital stock held by the state, or others, which is exempt from taxation. The principal object of this statement appears to be to enable the assessors to ascertain what portion of the capital stock was to be taxed as the personal estate of the corporation. And the sixth section, accordingly, directs the amount of such capital stock to be inserted in the assessment roll in the column of personal estate, after deducting therefrom the cost of the real estate, and the stock which is exempt from taxation. I think it is evident from these different provisions, that the legislature intended to tax corporations upon the nominal amount of the stock itself, and not upon its actual value to the stockholders, except as to manufacturing, turnpike, and marine insurance companies, which are to be taxed on a different principle. If the effects of a corporation have been permitted to increase beyond the nominal value of its capital stock, it is perfectly just and equitable that the excess should be subject to taxation; and it would be equally reasonable, on the other hand, to diminish the amount of tax where a part of the

capital had been lost, by the depreciation of property, or otherwise. But the legislature, for the sake of convenience, have only applied that principle to a few corporations, where it was probable there might be a great difference between the nominal and the actual value of their stocks. The object of the eighth section of this title was not to enable the officers of the corporation to reduce the amount of the assessment upon its capital stock, by swearing that the value of the stock does not exceed a certain amount. But it was to enable them to correct any erroneous estimate of the amount of the capital stock liable to taxation as such; and also to reduce an over-estimate of the actual value of the real estate described in the assessment roll.

The tax upon the supposed surplus funds of the bank being unauthorized by the existing laws, an injunction must issue to restrain the defendants from collecting the same.

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THE CONSTRUCTION OF THE REVISED STATUTES in regard to what property of a bank is subject to taxation, as here given, is recognized as correct in many subsequent adjudications in New York: *Pacific S. S. Co. v. Comm'rs of Taxes*, 46 How. 333; *Mutual Ins. Co. of Buffalo v. Supervisors of Erie*, 4 N. Y. 446; *People v. Commissioners*, 18 How. 246; *People v. Supervisors of Niagara*, 4 Hill, 22; *Farmers' Loan and Trust Co. v. Mayor of New York*, 7 Id. 263; *City of Utica v. Churchill*, 33 N. Y. 239; *People v. Dolan*, 36 Id. 62; *People v. Comm'rs of Taxes and Assessments*, 23 Id. 193; *Oswego Starch Factory v. Dolloway*, 21 Id. 456. Upon this ruling, the case is also referred to in *Coile v. Society for Savings*, 32 Conn. 189.

CHANCERY MAY TAKE JURISDICTION, although an adequate remedy exists at law where the parties waive objections to the jurisdiction; a proposition conceded on the authority of the principal case, in *Curtis v. Fox*, 27 N. Y. 302; *Clarke v. Sawyer*, 2 Id. 500; *Pumpelly v. Village of Oswego*, 45 How. 241; *Jones v. Collins*, 16 Wis. 602. But if the objection is taken by demurrer or answer, the bill must be dismissed: *Crane v. Conklin*, 22 Am. Dec. 519.

MANDAMUS WILL LIE TO COMPEL THE COMMON COUNCIL to correct its assessments; the point raised in *Bank of Utica v. City of Utica*, is a principle recognized in *Wilson v. Mayor of New York*, 4 E. D. Smith, 691; *People ex rel. Deberetti v. Gale*, 13 How. 269; *Adriance v. Supervisors of New York*, 12 Id. 227.

MANDAMUS TO COMPEL LEVY OF TAX.—See note to *Mayor v. Morgan*, 18 Am. Dec. 240

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## SMITH v. SMITH.

[4 PAIGE CH. 432.]

CONDONATION OR RECRIMINATION, to be taken advantage of in a suit for a divorce, should be urged by way of special plea, or insisted on in the answer as a defense.

**DEFENDANT IN A SUIT FOR A DIVORCE** may deny the adultery, and insist in the same answer that it has been condoned if committed; and may set up acts of adultery by the complainant in bar of the suit.

**A DIVORCE WILL BE DENIED** where it appears that the injured party, with full knowledge, has forgiven the injury, where there has been no subsequent misconduct; or where it appears that the adultery was committed by the procurement or with the connivance of the complainant.

**CONDONATION IS A CONDITIONAL FORGIVENESS**, and a repetition of the injury revives the condoned adultery.

**THE ADULTERY OF THE HUSBAND** before or after the adultery of the wife is a conclusive bar to a suit for a divorce brought by him. The husband's adultery any time before the final decree will bar his suit for a divorce, and may be availed of by a supplemental answer.

**SUIT for a divorce.** The case appears from the opinion.

*M. T. Reynolds*, for the complainant.

*S. Stevens and S. Cheever, contra.*

**THE CHANCELLOR.** As the case stood before the vice-chancellor, the decree was certainly correct; and there is no foundation whatever for the appeal. The circuit judge was right in rejecting the evidence offered by the defendant, to prove a condonation of the adultery which had been established by the testimony of the witness. The only questions properly triable at the circuit, on the pleadings in this case, were as to the defendant's guilt or innocence in relation to the several charges of adultery stated in the complainant's bill, and which were set forth in the circuit roll. In a case of this kind, if the defendant wishes to prove a condonation of the offense, or to establish a recriminatory charge in bar of the divorce, strictly, she should urge it by way of special plea, or insist on it in her answer as a defense. Although she denies the adultery charged in the bill, she may in the same answer insist that if any act of adultery has been committed, there has been a condonation or forgiveness of the offense, by a voluntary cohabitation, or otherwise. And she may also, in her answer, charge other acts of adultery, on the part of the husband, as a *compensatio criminis* or legal bar of the suit for a divorce, in case the adultery charged in the bill shall be established by proofs. Where a condonation or a recriminatory charge is set up in the answer, if an issue is awarded to try the charges of adultery contained in the bill, the same jury will be directed to inquire as to the truth of the alleged condonation, or the recriminatory charge; and the issues sent down to the circuit to be tried will be framed accordingly: See rule 168. If the adultery of the defendant is admitted by the answer, and a condo-

nation of the offense is set up in bar thereof, the truth of the alleged defense may be inquired into upon the reference to the master to inquire and report as to the facts charged in the bill; and a special direction to the master to that effect may be inserted in the order of reference, under the direction of the court.

If the defendant in this case had a good defense, by reason of a condonation, which, through mistake or inadvertence, she had neglected to set up in her answer, she should have applied to the court the first opportunity for leave to amend her answer, or to file a supplemental answer, for the purpose of putting that fact in issue. If it was not too late to set up that defense after the trial of the feigned issue, and I am inclined to think it was not if a sufficient excuse had been shown, she should have made a special application to the court immediately after the trial of the issue; and before the cause was sent down to the vice-chancellor for a final hearing and decree upon the equity reserved. This court, however, will in no case dissolve a marriage contract on the ground of adultery, where it appears from the pleadings or proofs, properly taken, that the injured party, with a full knowledge of all the facts, has actually forgiven the injury, and which has not been revived by subsequent misconduct, or where it appears that the adultery was committed by the procurement, or with the connivance of the complainant. The chancellor, therefore, at any time before a final decree in the cause, if there is reason to believe such a defense exists, may *ex officio* direct an inquiry to ascertain the fact. Such an inquiry, however, is not a matter of right on the part of the defendant. It is a matter resting solely on the discretion of the court to enable the chancellor to guard against fraud or collusion, in the exercise of a jurisdiction in which, as I have reason to believe, both parties are sometime concerned in attempts to deceive and mislead the court in reference to the real facts in the case: See 1 Consist. 292; 1 Hagg. Eccl. 752.

In the present case, the vice-chancellor, who had a full knowledge of the facts from what had transpired before him at the circuit, was unquestionably right in declining, *ex officio*, to order an inquiry to ascertain those facts, as they were wholly insufficient to justify the court in refusing the divorce. It does unquestionably appear that while the defendant continued to live with her husband, he was either more incredulous or more forbearing than most men would have been under similar circumstances. And he probably would have forgiven his wife and

continued to live with her, even after he had reason to believe she had been unfaithful to his bed, could she have been prevailed upon to change her course of conduct and to reject the improper attentions of her paramour. But there was nothing adduced in evidence on the trial of the criminal conversation suit to induce a belief that the husband intended to connive at, or to encourage, an illicit intercourse between his wife and another. Condonation is a conditional forgiveness, and a repetition of the injury revives the condoned adultery: *Durant v. Durant*, 1 Hagg. Eccl. 745. And I think there was sufficient evidence on the trial to satisfy any reasonable mind that the adultery of the wife was continued after she left the house of her husband; subsequent to which time there is no pretense of cohabitation with the complainant, or of actual forgiveness. And if such subsequent adultery can fairly be presumed, then all the former adulteries are revived. In *Turton v. Turton*, 3 Hagg. Eccl. 350, Dr. Lushington, in delivering the opinion of the consistory court of London, says: "I take it to be clear that according to the doctrine of this court, and according to all the principles in similar cases, if it can be once shown that the parties had been cohabiting in an illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those who live under the same roof are not prepared to depose to that fact." And certainly, if courts of justice are to draw the same conclusions which everybody else would draw from the same facts, when it is once established that an adulterous intercourse has commenced between parties, and they are found living together, under circumstances which would induce every unprejudiced mind to conclude their inclinations had not changed, the fair presumption is, that the illicit intercourse is still continued. What, then, were the facts here? The fact of adultery having been committed by this woman with a particular individual, at different times, and in various situations, before she left the house of her husband, is satisfactorily established by the testimony of several respectable witnesses. And when she left her husband she went immediately to the house of her paramour, who received her, and assisted her to carry off her clothes; and she continues to live with him. It is true he had a wife residing at the same place, but it appears from the testimony of one of the witnesses, that even the presence of the wife was not sufficient to restrain the indecent familiarities of the defendant with the adulterer; as the wife came into the room while her



husband had his arms around the defendant's neck. Upon the whole, I am satisfied that if the whole testimony which was adduced in the other case, had been gone into upon the trial of the feigned issue, and the question of condonation had been properly before the jury, they must have arrived at the conclusion that the adulterous intercourse continued long after the pretended acts of forgiveness on the part of the complainant.

The recriminatory charge, of an adultery committed by the complainant, is of a very different character. If a husband who seeks to obtain a divorce on account of the criminal conduct of his wife, has himself been guilty of the same offense, whether before or after the adultery of the wife, it is a conclusive bar to the suit: *Forster v. Forster*, 1 Hagg. Consist. 144; *Asley v. Asley*, 1 Hagg. Eccl. 714; Pointer Mar. and Div. 224; 2 Rev. Stat. 145, sec. 42, sub. 4. It appears from the petition and affidavits, and the fact is not denied on the part of the complainant, that while he was carrying on this suit against his wife, to obtain a divorce on account of her adultery, an adulterous intercourse, on his part, was commenced with his servant girl, which continued down to the time of the decree. Although this misconduct of the complainant did not occur until after the commencement of the suit for a divorce, and after a feigned issue had been awarded, it would have been as effectual to bar the suit, if it had been discovered in time, as if it had occurred previous to the adultery of the wife: Pointer Mar. and Div. 224; *Brisco v. Brisco*, 2 Addams Eccl. 259. Upon a proper application, therefore, even after the trial of the feigned issue, and at any time before the final decree, if such application had been made immediately after the discovery of the fact, it would have been the duty of the court to have permitted the defendant to put in a supplemental answer, or to file a cross bill, in the nature of a plea *puis darrein continuance*, at law, for the purpose of setting up this new defense: See Hopk. 27; Willis on Pl. 364. Whether such a defense may be brought before the court by a cross-bill in the nature of a bill of review, when the fact is not discovered until after a final decree, is a question that does not appear to have been decided in any case which I have been able to discover. I shall, therefore, express no opinion on that question, as it can not be decided on the present application. If relief of that kind can be obtained after such a lapse of time, the proper course for the appellant appears to be to dismiss her appeal, and to apply

to the vice-chancellor, by whom the final decree in the cause was made, for leave to file such a bill.

As there is no foundation for the appeal, the court need not, in this case, preclude the possibility of such an application by a technical affirmance of the decree. I shall, therefore, direct the appeal to be dismissed with costs, to be paid by the appellant, including the costs of opposing this application; and without prejudice to any application to the vice-chancellor, which the defendant may be advised to make.

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THE PRACTICE IN RESPECT TO MATTERS OF CONDONATION AND RECRIMINATION in defense to a divorce proceeding as here outlined is commented upon in subsequent New York decisions, in which some of the points here taken are not fully recognized. Although in *Burr v. Burr*, 2 Edw. 449, and in *Strong v. Strong*, 23 How. Pr. 432, the filing of a supplemental answer setting up the adultery of the plaintiff discovered after the issues were first joined is deemed permissible, yet in *Burdell v. Burdell*, 2 Barb. 474; S. C., 3 How. Pr. 216, the proper way for the party to take advantage of such facts is said to be to obtain an order that the cause stand over until a new bill, in which the facts could be put in issue, could be brought to a hearing with the original suit. The practice in respect to framing separate issues on the plea of condonation is referred to in *Morell v. Morell*, 3 Barb. 241; S. C., 1 Id. 323.

ADULTERY OF THE PLAINTIFF IS A BAR to a suit for a divorce for previous adultery of the defendant: *Christianberry v. Christianberry*, 25 Am. Dec. 98.

MISCONDUCT OF PLAINTIFF WHEN A BAR to a suit for a divorce: *Pierce v. Pierce*, 15 Am. Dec. 210, and note.

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## TRUSTEES OF VILLAGE OF WATERTOWN v. COWEN.

[4 PAIGE CH. 510.]

THE REMOTE AND CONTINGENT INTEREST OF A CORPORATOR in a mere municipal corporation, is not sufficient to exclude him as a witness in behalf of the corporation.

DEDICATION OF LANDS FOR STREETS.—When the owners of urban property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such a plat, they can not resume control over the property so as to deprive their grantees of the benefit of having such streets kept open.

THE SAME PRINCIPLE IS APPLICABLE to a dedication of lands to be used as an open square or public walk.

A MUNICIPAL CORPORATION IS THE PROPER REPRESENTATIVE of the equitable rights of the inhabitants of a village to the use of a public square, and is authorized to file a bill in equity to prevent the erection of a nuisance therein.

A COVENANT NOT TO ERECT A BUILDING ON THE GRANTOR'S LAND in front of the tract conveyed runs with the land, and passes to an assignee without any separate assignment of the covenant.

THE GRANTEE OF AN EASEMENT is entitled to an injunction to restrain the erection of buildings on the servient tenement in violation of a covenant not to do so.

WHERE ONE HAS DEDICATED LANDS FOR A PUBLIC SQUARE, no special covenant is necessary to authorize his grantees to insist upon the square being kept open.

AN INDIVIDUAL MAY JOIN WITH THE MUNICIPALITY to prevent the erection of buildings on lands dedicated to a public use.

MISJOINDER MUST BE TAKEN ADVANTAGE OF by demurrer or by answer; objection comes too late at the hearing.

APPEAL from the decree of the vice-chancellor refusing to grant a motion for the dissolution of an injunction, restraining the defendants from erecting a building on a certain public square. The facts further appear from the opinion.

*J. Edwards*, for the complainants.

*M. T. Reynolds*, *contra*.

THE CHANCELLOR. The decision of the vice-chancellor was correct in refusing to suppress the depositions of Huntington, the trustee, and of the other witnesses who were inhabitants of the village of Watertown. The remote and contingent interest of a corporator in a mere municipal corporation, is not sufficient to exclude him as a witness in behalf of the corporation. And Huntington, the trustee, although an agent of the corporation, has no other or greater interest in the event of a suit brought in its corporate name, than any other inhabitant of the village. The corporation, and not the trustee of the corporation, is the party to the suit.

In this case, I am satisfied from the evidence that the public square in the village of Watertown was dedicated to the use of the inhabitants of the village, by Coffeen and the defendant Cowen, the original proprietors, as early as 1806. The recent cases in the supreme court and in the court for the correction of errors, relative to the dedication of lands in the city of New York for the purposes of streets, have settled the principle that when the owners of urban property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such a plat, it is too late for them to resume a general and unlimited control over the property thus dedicated to the public as streets, so as to deprive their grantees of the benefit they may acquire by having such streets kept open. And this principle is equally applicable to the case of a similar dedication of lands, in a city or village, to be used as an open square or public walk. The case of *The City of Cin-*

*cinnati v. The Lessee of White*, 6 Pet. 431, in the supreme court of the United States, is, in this respect, very much like the one now under consideration. In that case, the equitable owners of a tract of land, before they had perfected their title thereto by a patent from the government, laid out a part of the tract into a town, which now constitutes the site of the city of Cincinnati. And upon the plat of such town they laid out and designated a part of the land as a public common, or open square, for the use of the inhabitants of the town. This was held to be a sufficient dedication of the land to the public, to vest the title to this common, or public square, in the city of Cincinnati, although the city was not incorporated until many years afterwards.

It is objected that the present suit is not properly brought in the name of the corporation of the village of Watertown. The usual mode of proceeding in this court to restrain the erection of a nuisance, or any other unwarrantable intrusion upon or interference with the rights of the public, is by an information in the name of the attorney-general. But in the case of the public square in the city of Cincinnati, the supreme court of the United States held that the right to the land vested in the corporate body, for the benefit of the citizens, upon the incorporation of the city. And although I do not feel disposed to go the length in this case of holding that the legal title to the land is vested in the corporation of the village, yet I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation, in this court, to protect those equitable rights against the erection of this nuisance. The court of chancery in England granted an injunction upon the application of the corporation of the city of London to prevent a nuisance, by which the lives of the citizens would be endangered: *The Mayor etc. of London v. Bolt*, 5 Ves. 129. And in the state of North Carolina a decree for a perpetual injunction to restrain the erection of a nuisance which would endanger the health of the town of Tarborough, was made upon a bill filed by the attorney-general and the inhabitants of the town jointly: *The Attorney-general and others v. Blount*, 4 Hawk, 384.

The covenant in the conveyance to Hersey not to erect or suffer to be erected any tenement, edifice, or structure on the street, highway, or common, owned by the grantor in front of

the premises conveyed, was a covenant running with the land. It was the grant of a privilege, or easement, which passed to White under the conveyance from Hersey to him; and no separate assignment of the covenant was necessary to transfer all Hersey's interest therein. And this court has already decided that the grantee of such an easement is entitled to an injunction, to restrain the owner of the servient tenement from erecting buildings thereon in violation of his covenant: *Hills v. Miller*, 3 Paige, 254. I do not understand this covenant as only intended to prevent the erection of a tenement or building directly in front of the Hersey lot. The agreement, according to my construction of it, is, that the grantor will not erect buildings, or suffer them to be erected, on the common or public square, which is in front of the premises conveyed. Under such a covenant the present owner of the Hersey lot has a right to insist that the whole public square shall be kept open, as the existence of such an open space in a populous village must, of course, enhance the value of the lots fronting on the same. And if the owner of the public square had already dedicated it to the public, no special covenant was necessary to authorize his grantees to insist that it should be kept open for their benefit or their assigns.

If each of the complainants had a right to file a bill to restrain the erection of this nuisance, as they had a common right, and the injury was the same or common to both, I see no valid objection to their joining in one suit. But even if there was a misjoinder, the objection should have been made by demurrer, or in the answer of the defendants. It is too late to urge a mere formal objection of this kind for the first time at the hearing. The decree of the vice-chancellor is therefore affirmed, with costs.

The whole case being thus disposed of on the merits, it would be useless to spend the time of the court in examining how far the case presented upon the bill and answer differed from that which is now presented upon the pleadings and proofs, with a view to the decision of the first appeal. For the sole purpose, therefore, of disposing of that appeal, the decision of which at this time can be of no use to either party, except as to the mere question of costs, which, in this case, are in the discretion of the court, I shall direct the first appeal to be dismissed, and without costs.

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THE INTEREST OF A CORPORATOR IN A PUBLIC CORPORATION is too remote and contingent to exclude him as a witness on behalf of the corpora-

tion: *Pack v. Mayor of New York*, 3 N. Y. 493; *Sawyer v. City of Alton*, 3 Scam. 129.

**DEDICATION OF LANDS TO PUBLIC USE.**—Commons dedicated to public use can never be appropriated exclusively by the original proprietor to a private use: *Perkins v. Perkins*, 44 Barb. 136; *Adams v. Saratoga and W. R. R. Co.*, 11 Id. 450; *Wood v. Seely*, 32 N. Y. 116; *Livingston v. Mayor of N. Y.*, 22 Am. Dec. 622; *Pomeroy v. Mills*, 23 Id. 207, and note; *Abbott v. Mills*, Id. 222, and note; *State v. Catlin*, Id. 230. Such a dedication will arise where the owner of land has laid out village lots on a map, intersected with roads and public squares, and sells lots with reference to such map: *Post v. Pearsall*, 22 Wend. 435; S. C., 20 Id. 117; *Taylor v. Hopper*, 62 N. Y. 650, in memoranda of cases not reported in full: *Trustees v. Walsh*, 57 Ill. 368; *Livingston v. Mayor of N. Y.*, 22 Am. Dec. 622. To constitute a dedication there must be an *animus dedicandi*, and when that is ascertained, whether by the express declarations and the acts of a party or by user, it is sufficient: *Wiggins v. Tallmadge*, 11 Barb. 462. In *Wood v. Seely*, 32 N. Y. 116, the doctrine of estoppel is applied to a dedication of lands in favor of third persons, purchasers.

**THE TRUSTEES OF A PUBLIC CORPORATION** represent the rights of the people, and may institute proceedings to protect them: *Mayor of New York v. Stuyvesant*, 17 N. Y. 43; *Potter v. Chapin*, 6 Paige, 650.

**COVENANTS RUNNING WITH THE LAND.**—Principal case is further referred to in illustration of the rights and duties flowing from covenants running with land, and as evidencing what burdens may so run. For example, covenants to pay rent run with the land: *Tyler v. Heidorn*, 46 Barb. 452; so a grantor's promise to share in repairs in keeping up a dam: *Denman v. Price*, 40 Id. 216; a covenant not to erect buildings on other lands of the grantor: *Van Rensselaer v. Read*, 26 N. Y. 575; *Trustees v. Lynch*, 70 Id. 452, and easements annexed to a mill seat: *Child v. Chappell*, 9 Id. 255. What covenants run with the land: See the note to *Fullon v. Stuart*, 15 Am. Dec. 544; *King v. Kerr*, 22 Id. 777, and note; *Suydam v. Jones*, 25 Id. 552.

**AN EASEMENT WILL BE PROTECTED IN CHANCERY** by granting an injunction to restrain the doing of that upon the servient estate which would destroy or prejudice the easement: *Lawrence v. Mayor of New York*, 2 Barb. 581; *Schermerhorn v. Mayor of New York*, 3 Edw. 130; *Wheeler v. Gilsey*, 35 How. 147; *Seymour v. McDonald*, 4 Sandf. Ch. 508; *Whitney v. Union Railway Co.*, 11 Gray, 365; *Schworer v. Boylston Market Association*, 99 Mass. 298; *City of Jacksonville v. J. R. W. Co.*, 67 Ill. 544.

Followed also as authority that several parties having a common right may unite in a bill in equity to prevent an injury thereto: *Murray v. Hay*, 1 Barb. Ch. 64; and so also *Birely v. Staley*, 25 Am. Dec. 303.

## ROGERS v. ROGERS.

[4 PAIGE CH. 516.]

- ▲ **FEME-COVERT CAN MAKE NO VALID AGREEMENT WITH HER HUSBAND** to live separate from him, except under the sanction of the court, and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation.

**VOLUNTARY AGREEMENTS FOR SEPARATION** between husband and wife are not authorized by the law; it merely tolerates such agreements when made in such a manner that they can be enforced by or against a third person acting in behalf of the wife.

**A PAROL AGREEMENT BY A FEME-COVERT TO DISCONTINUE A SUIT** for separation is inoperative.

**APPLICATION** by complainant for an order against the defendant, her husband, for an allowance to carry on this suit for a separation, and for alimony. The defendant opposed the application on the ground that the suit had been settled, and they had agreed to live separate, he having given a bond to a trustee selected by her, to secure the payment of four hundred dollars annually, payable quarterly during her life.

*A. Taber*, for the complainant.

*J. Paine*, *contra*.

**THE CHANCELLOR.** Whether the settlement which was made between the complainant and her husband was a judicious and reasonable one, and one which would have been beneficial to her if she had thought proper to adhere to its terms and to comply with its conditions, is a question which it is not necessary for me to decide upon the present application. It is evident, however, from the affidavits produced on the part of the defendant, that no fraud or imposition was practiced upon the complainant on the settlement; and that she entered into the arrangement voluntarily and understandingly, after consulting with her friends as to the terms of compromise which were proposed by the defendant. Although her brother, in whose name the suit was instituted as the next friend of the complainant, gave no written assent to the terms of settlement, he was undoubtedly consulted in relation to the propriety of the compromise of the suit; and he consented that the complainant should settle it in such way as she should deem proper.

But it is impossible for a *feme-covert* to make any valid agreement with her husband to live separate from him, in violation of the marriage contract, and of the duties which she owes to society, except under the sanction of the court; and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. The law of the land does not authorize or sanction a voluntary agreement for separation between husband and wife. It merely tolerates such agreements when made in such a manner that they can be enforced by or against a third person acting in behalf of the wife.

In the ecclesiastical courts of England, where a jurisdiction exists to decree a restitution of conjugal rights between married persons, a deed of separation is no bar to a suit instituted for that purpose; as the indissolubility of the marriage contract renders it impossible for the parties lawfully to release each other from the reciprocal duties which the relation of husband and wife implies: *Westmeath v. Westmeath*, 2 Hagg. Eccl. Rep. App. 115; neither is a deed of separation a bar to a divorce. Sir William Scott, in delivering the judgment in the case of *Mortimer v. Mortimer*, 2 Hagg. Consist. 318, says the court considers a private separation an illegal contract. It implies a renunciation of stipulated duties; a dereliction of those mutual offices which the parties are not at liberty to desert; an assumption of a false character in both parties, contrary to the real *status personæ*, and to the obligations which both of them have contracted, in the sight of God and man, to live together until death; and on which obligations the solemnities both of civil society and of religion have stamped a binding authority, from which the parties can not release themselves by any private act of their own, or for causes which the law has not pronounced to be sufficient, and sufficiently proved. In the present case the complainant has a right to prosecute a suit for a legal separation from her husband, if he has been guilty of such conduct towards her as to render it unsafe and improper for her to cohabit with him, or if he has abandoned her without any justifiable cause and neglects or refuses to provide for her support, notwithstanding the agreement for a separation which is set up in the affidavits on the part of the defendant. And, as a necessary consequence, the bond for her support having become void, because the terms and conditions upon which it was given have not been complied with on her part, she must have an allowance for her support pending the litigation; and a reasonable advance must also be made to her for the necessary expenses of the proceedings. Such advance, however, is to be paid over to her next friend, in whose name the suit is prosecuted, upon his written stipulation to refund the same, under the direction of the court, if the complainant's bill should hereafter be dismissed with costs, for want of prosecution, or on the ground that the suit was commenced without any reasonable or justifiable cause.

Although the agreement for a separation was not binding upon the wife, and could not be pleaded in bar to a suit against her husband, it was undoubtedly competent for her, with the



consent of her next friend, to agree to a discontinuance of the suit. I should therefore have considered the present suit as actually discontinued, and should have directed an order to be entered accordingly, without prejudice to her right to proceed anew, had not her counsel insisted upon the objection that the agreement to discontinue the suit was not in writing, as required by the one hundred and twenty-first rule. That objection is well taken, as there was no agreement in writing to discontinue the suit subscribed by the complainant, or her next friend, or by their solicitor or counsel. And the compromise of the cause of action, by the agreement for a separation, being invalid, that furnishes no reason for considering the suit as at an end.

It must be referred to a master residing in the county of Washington, to report a suitable quarterly allowance for the support of the complainant pending this litigation, and a reasonable sum to be paid to her next friend for the expenses of the litigation. And upon the coming in and confirmation of the report, the defendant must pay over the allowance thus made by the master; the alimony to be paid to herself, and the allowance for the expenses of the suit to be paid to her next friend, upon his written stipulation as above specified. In ordinary cases it would be proper to direct the allowance for alimony to commence from the time of presenting the petition; but in this case, as the complainant received three hundred and fifty dollars under the agreement which she now repudiates, the allowance is only to commence from the first of July last.

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CONSTRUCTION OF ARTICLES OF SEPARATION entered into in Louisiana under the Spanish laws: *Labbe's Heirs v. Abat*, 22 Am. Dec. 151. The principal case is cited on the following points: agreements for future separation of husband and wife are void whether entered into through a trustee: *Gould v. Gould*, 29 How. 458; or not: *Mercein v. The People*, 25 Wend. 77; *Morgan v. Potter*, 17 Hun. 404; and when voluntary and without consideration, can not be enforced: *Cropey v. McKinney*, 30 Barb. 57. But a covenant with a trustee that the wife should live separate, and that the husband would not compel cohabitation or molest her, or claim any money, goods, or property which she possessed or might acquire, followed by an absolute conveyance to the trustee of all her property, is good: *Heyer v. Burger*, 1 Hoff. 6; and in articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy: *Dupre v. Reia*, 56 How. 230.

## LLOYD v. BREWSTER.

[4 PAIGE CH. 537.]

**A PROPER CASE FOR A BILL WITH A DOUBLE ASPECT** is, where the complainant is in doubt whether he is entitled to one kind of relief or another, upon the facts as stated in the bill; in such case he may frame his prayer in the alternative.

**IDEM.**—So if the nature of the complainant's relief depends upon the existence or non-existence of a particular fact, not within his knowledge, he may allege his ignorance, call for a discovery, and frame his prayer in the alternative.

**IDEM.**—But a vendor can not treat a sale as valid and recover judgment for the price, and at the same time repudiate the sale for fraud, and proceed to recover the goods from third persons to whom they have been assigned for value.

**ELECTING BETWEEN FORM OF ACTION.**—A vendor of goods on whom a fraud has been practiced, may elect either to affirm the sale, and proceed as a judgment creditor, or to avoid the sale and follow the goods into the hands of one who has not parted with value on the faith of them.

**AN AMENDMENT WILL NOT BE ALLOWED** which changes the whole character of the litigation.

**APPEAL** from a decree of the vice-chancellor. The bill filed was a creditor's bill alleging the recovery of judgment in an action for the purchase price of goods sold to Brewster, and the return of the execution unsatisfied. The bill also set out that the goods were obtained by the fraudulent representation of Brewster, and Ramsdell and Brown, as to the former's credit, and that these others had taken an assignment of all Brewster's effects, the goods being for the most part the same sold by complainant; that the assignment was for the purpose of defrauding creditors, and that a certain bond and warrant of attorney to confess judgment, given by Brewster to Ramsdell and Brown, was also fraudulent. The bill prayed that the bond and warrant be surrendered, that the assigned property be delivered up, that an account be taken and complainant's debt paid, and for an injunction. On coming in of the answers denying all fraud, and averring that the assignment was for a debt *bona fide* due, the injunction was dissolved. Complainant's application that he might amend his bill by charging that he had obtained his judgment before obtaining knowledge of the fraud, and that he might amend his prayer to make in the alternative, to correspond with the relief to which he was entitled, was denied. Whence this appeal was taken.

*T. R. Lee*, for the complainant.

*N. Hill, jun.*, *contra*.

The CHANCELLOR. The vice-chancellor was right in supposing this was not a case for a bill with a double aspect. That the different parts of the bill would be inconsistent with each other, if the complainant was permitted therein to treat the sale to Brewster as valid, by proceeding against him as a judgment creditor under the judgment recovered for the price of the goods upon the sale, and was at the same time permitted to repudiate such sale on account of the fraud practiced upon the complainant in obtaining the goods, and to seek a recovery of the specific articles, or the proceeds thereof, in the hands of another of the defendants, to whom they had been assigned for the payment of antecedent debts. A proper case for a bill with a double aspect is where the complainant is in doubt whether he is entitled to one kind of relief or another upon the facts of his case as stated in the bill. In such a case he may frame his prayer in the alternative; so that if the court is against him as to one kind of relief prayed for, he may still be enabled to obtain any other relief to which he is entitled under the other part of the alternative prayer. So also where a complainant is entitled to relief of some kind upon the general facts stated in his bill, if the nature of the relief to which he is entitled depends upon the existence or non-existence of a particular fact, or circumstance, which is not within his knowledge, but which is known to the defendant, he may allege his ignorance as to such fact, and call for a discovery thereof. And in such a case he may also frame his prayer in the alternative, so as to obtain the proper relief, according as the fact may appear at the hearing of the cause. Here the complainant alleges that the goods were obtained from him by the fraudulent representations of the purchaser and the other defendants. And he states a case of fraud in his bill, which, if true, would subject the purchaser to imprisonment in the state prison for obtaining goods by false pretenses. He had therefore a perfect right to elect to consider the sale as void, and to follow his goods, or the proceeds thereof, into the hands of the assignee who had paid no new consideration therefor on the assignment. Or he might elect to affirm the sale, or to consider it as valid; and to proceed as a judgment creditor against all the property, equitable interests, and choses in action of his debtor, either in his own hands, or in the hands of a fraudulent assignee. And he might look to Ramsdell and Brown personally for the balance which remained uncollected, if he could establish the fact of their participation in the original fraud in obtaining the goods. I think it is pretty evident that the orig-

inal bill, in the present case, was not framed with a view to the first kind of relief. The complainant hoped to reach all the assigned property, under a creditor's bill founded upon his judgment, upon the allegations of fraud in the assignment, which were stated in his bill as it was subsequently amended. But the assignee having denied all fraud in the assignment, the complainant now wishes to abandon his judgment recovered for the price or the goods, or rather to place himself in a situation to repudiate the sale in part, so as to follow such part of his goods, or the proceeds thereof, into the hands of the assignee, on the ground of a prior equity. This would be changing the whole character of the litigation; which I think should not be permitted upon a sworn bill, and in this stage of the suit.

The decision of the vice-chancellor is therefore affirmed, with costs.

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A BILL MAY BE FRAMED WITH A DOUBLE ASPECT where it is doubtful what relief should be awarded the complainant on the facts: *Colton v. Ross*, 22 Am. Dec. 658. The rule in respect to the cases proper for a bill with a double aspect, as announced by the chancellor in the principal case, is quoted and followed in *Hart v. McKeen*, Walk. Ch. 420.

FRAUD IN SALE, VENDOR'S RIGHTS.—Where a sale is fraudulently induced, the vendor may elect either to waive the fraud, affirm the sale, and sue on the contract, or he may proceed for the fraud: *Scott v. Simmons*, 34 How. Pr. 67; *Wheaton v. Baker*, 14 Barb. 601; *Bruce v. Davenport*, 3 Keyes, 475. But having discovered the fraud, if the vendor goes on with the sale, he is bound by it in respect to the rate of compensation: *People v. Stephens*, 51 How. Pr. 251; *Saratoga and S. R. R. Co. v. Row*, 24 Wend. 75; and if he proceeds to judgment on the contract after having discovered the fraud, his election is determined, and he can not follow the goods into the hands of a third person on the ground of fraud: *Bank of Beloit v. Beale*, 34 N. Y. 475. The principal case is also cited in support of these propositions: the voluntary delivery of goods after the discovery of fraud in the contract for their purchase, passes the title: *Locker v. Rhoades*, 45 Barb. 501; and that in order to set aside a sale for fraud, such a case must be made out as would authorize a jury to convict the purchaser of obtaining goods under false pretenses: *Henshaw v. Bryant*, 4 Scam. 107. The vendee's fraud renders the sale voidable by the vendor as to the vendee, and as to those claiming under him with notice: *Rowley v. Bigelow*, 23 Am. Dec. 507; and as to attaching creditors of the vendee: *Buffington v. Gerrieh*, 8 Id. 97; but it must appear that the vendor was induced to part with the goods by the fraudulent representations of the vendee: *Cross v. Peters*, 10 Id. 78.

## EVERSON v. KIRTLAND.

[4 PAIGE CH. 628.]

A COVENANT TO CAUSE TO BE CONVEYED BY GOOD AND SUFFICIENT WARRANTY DEED, is not complied with by the mere giving of a warranty deed where the warrantor has no title, or an imperfect title to the land.

IDEAL.—It must be a deed good and sufficient, both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed.

BILL to rescind an agreement to receive certain Ohio lands in part payment for certain lands in Oneida county, conveyed to the defendant. The case further appears from the chancellor's opinion.

*E. Allen*, for the complainant.

*S. Beardsley*, *contra*.

THE CHANCELLOR. The vice-chancellor has put his decision in this cause upon the ground of a mistake of both parties, as to the existence of a title in Martin Kirtland, in the Ohio lands intended to be conveyed in payment for the Vernon farm. The complainant contracted for lands lying in township No. 6, although he would probably have made the bargain as readily if he had been informed that the lands he was to receive in payment lay in the other township. Upon this supposition, if the defendant or his father had really owned the lands in township No. 5, it probably would have been doing no injustice to the complainant if he had been compelled to take the lands described in the patent. But although, from the testimony, I have no doubt that the defendant intended to sell, and to procure a deed from his father for the lands mentioned in the patent, and that he really misread the description in the patent, I think there is sufficient evidence, from the testimony of his own witnesses and from his exhibits, to show that he intended to impose a title upon the complainant which he knew to be imperfect.

In the first place, the person who drew the original contract between the parties, although he described the land correctly, except as to the number of the township, which was undoubtedly misread, and gave the precise date of the patent, yet he appears to have stopped short in his description in not stating to whom the patent was given. This agreement bears date on the seventeenth of January; and yet exhibit B, which bears date, and is proved to have been written, about a fortnight before, contains a false recital, which is also contained in the second deed exe-

cuted by the defendant's father, that Ira B. Kirtland was seised of the Ohio lands by virtue of a conveyance from Martin Kirtland and the other heirs at law of the deceased soldier, and that such lands had come to Martin Kirtland by descent from his deceased son, and by a quitclaim from the widow. The defendant, therefore, when he procured that deed to be drawn, in which his own name was originally inserted as the grantee from his father, must have known that the five brothers and sisters of his father were entitled to five sixths of the land under the patent, as the heirs at law of his grandfather; and this recital, which his father now swears was absolutely false and unfounded, must have been inserted therein for the purpose of deceiving and imposing upon the complainant, and to induce him to suppose the title was perfect. There is the more reason to suspect that such was the intention of the defendant at that time, from the fact that a similar imposition was actually attempted to be practiced upon the complainant in the deed which was offered him on his return from Ohio. Even the father was imposed upon in that case; for he swears that he would not have signed that deed if he had known such false recitals were contained therein. The father probably honestly supposed, as he states, that his title was perfect under the patent, as heir to his son Ira, to whom he had promised the land before the patent was obtained. The only conclusion I can draw from these facts is, that the defendant was, from the beginning, aware that his father's title to the Ohio lands was defective, and that five sixths of the land belonged to other persons. That he concluded in the first place to take a deed from his father, containing these false recitals, showing a title through a conveyance from all the patentees to his brother Ira, and through him to his father; and that exhibit B was prepared accordingly. That finding a deed with warranty would be required from himself in that case, he concluded to keep back the patent, and to give an agreement for a warranty deed from his father, concealing the fact that the patent was to the father and the rest of the heirs also. In this he probably would have succeeded, had it not been for his own mistake in misreading the patent, by which the wrong township was inserted in the agreement and in the deed. And finding that he had made that blunder, he then attempted to do what he had contemplated doing soon after the execution of the agreement; that is, to impose upon the complainant, by a deed from Martin Kirtland directly to him, containing false recitals which ap-

parently showed a good title in the father to the whole of the Ohio lands, under the patentees.

The covenant of the defendant was, to cause the Ohio lands to be conveyed to the complainant by a good and sufficient warranty deed, to be executed by Martin Kirtland and wife, free and clear of all incumbrances. And neither of the deeds which were given or offered to the complainant would have been a compliance with the terms or the spirit of the covenant, even if there had been no mistake in the number of the township. A covenant to cause to be conveyed by a good and sufficient warranty deed, is not complied with by the mere giving of a warranty deed where the grantor has no title to the land, or where his title is imperfect. It must be a deed good and sufficient, both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed. But the deeds in this case were not good, either in form or substance. Conveyances for lands in the state of Ohio were originally subject to the provisions of the ordinance of congress of 1787, relative to the north-western territory; which ordinance is still the law of that state, unless it has been changed by statute. By the former, as well as the statute law of that state, a conveyance of land, to be valid, must be executed in the presence of two witnesses. And the supreme court of the United States has decided that a deed of lands in Ohio, executed in the presence of one witness only, although duly acknowledged and recorded, is absolutely void. Neither of the deeds in the present case was executed in the presence of more than one witness; nor had the grantor any good and available title to convey, except as to an undivided portion of the lands.

If there was no fraud in the case, perhaps the objection might have been made that the complainant had a perfect remedy at law upon his covenant. But as that objection was neither made by demurrer, nor in the answer of the defendant, it is too late to make it at the hearing.

The vice-chancellor certainly has been sufficiently favorable to the defendant in only charging him for the value of the land as fixed by the parties, in their estimates, at the time of the execution of the agreement, and as specified in the deed. This was the rule adopted by the supreme court in the case of a *bona fide* vendor who covenanted to convey lands to which he believed he had a valid title. And the defendant may think himself fortunate that the court did not direct a reference to a master to ascertain the value of the lands in township No. 6,

which he agreed to convey, and charge him with the full value of those lands, and the interest thereon, from the time he should have conveyed them, according to the terms of the written agreement. As those lands were in the hands of actual occupants, the value thereof, with their improvements, would probably far exceed the estimated value of two dollars and fifty cents per acre. And a party who attempts to commit a fraud, if he makes a slip, is not entitled to relief against his own mistake in favor of the party intended to be defrauded.

The appellant has no right to complain of this decree, as it is as favorable to him as the circumstances would justify. It must therefore be affirmed, with costs

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ONE WHO COVENANTS TO GIVE A GOOD WARRANTY DEED must make a conveyance that will carry the title to the land: *Hill v. Ressegien*, 17 Barb. 166; *Penfield v. Clark*, 62 Id. 591; *Burwell v. Jackson*, 9 N. Y. 544. The same principle is deduced from a large number of cases considered in the note to *Porter v. Noyes*, 11 Am. Dec. 34, and is laid down in *Dearth v. Williamson*, 7 Id. 652.



CASES  
IN THE  
SUPREME COURT  
OF  
NEW YORK.

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PEOPLE v. CORPORATION OF ALBANY.

[11 WENDELL, 539.]

MUNICIPAL CORPORATION IS INDICTABLE FOR NEGLECT TO REMOVE A NUISANCE in a public river, or basin connected therewith, which it has lawful power to remove.

CORPORATION OF ALBANY HAS POWER TO CLEANSE THE BASIN in the Hudson river at the termination of the Erie canal, if it can be done by excavating or deepening the channel, and is liable to indictment for a neglect to do so, whereby accumulations of deposits are suffered to continue in such basin which are injurious to the public health.

SUCH CORPORATION HAS NO POWER TO REMOVE THE BULKHEAD at the end of such basin, erected by a joint stock company under a special act of the legislature, even though a nuisance to the public health is occasioned thereby, and is not subject to indictment for neglecting to do so.

CORPORATION HAS ONLY SUCH POWERS as are conferred by its charter or other statutes.

ERROR from the general sessions of Albany to reverse a judgment rendered against the corporation of Albany, on a verdict of guilty, returned upon an indictment against such corporation for neglecting to remove a nuisance occasioned by the accumulation of rubbish and foul deposits in the basin of the Hudson river, at the termination of the Erie canal, whereby the water was corrupted and made unfit for use, and the air was infected with noisome and unwholesome smells, to the common nuisance of the citizens in the vicinity. On the defendants' plea of not guilty, the fact as to the accumulations in question being injurious to the public health and comfort was fully proved; but some of the witnesses testified on cross-examination that the

nuisance could only be abated by removing the bulkhead at the end of the basin. It appeared that the bulkhead was erected by a joint stock company, under the authority of an act of the legislature, and with the assent of the corporation of Albany. The court instructed the jury, contrary to the prayer of the defendants, that the corporation were liable in this action for not removing the nuisance if the jury were satisfied that it was a nuisance, and that it was their duty to remove such nuisance, even if it should be necessary to cut away the bulkhead, the safety and preservation of the public health being the paramount law. The defendants assigned error in these instructions, and in the refusal of the contrary instructions asked by the defendants.

*J. McKown*, for the corporation.

*E. Livingston*, district attorney, for the people.

By Court, NELSON, J. The defendants were indicted and convicted for neglecting to do an act in which the public are deeply interested, and which, it is supposed, belonged to them as a part of their duty, under their charter. By the charter, Laws of 1826, p. 192, sec. 15, they are, among other things, empowered "to abate or remove any nuisances in any street or wharf, or on the lot or inclosure of any person," "to prevent all obstructions, in the river, near or opposite to such wharves, docks, or slips." "And generally to make all such rules, by-laws, and regulations for the good order and government of the city, and the commerce and trade thereof, as they may deem expedient, not repugnant to the constitution and laws of this state." These provisions are extracted from the law of 1826, but the powers they convey always belonged to the city: 2 R. L. 468, 469. Since 1808 the jurisdiction of the common council of Albany has extended to the middle or main channel of the Hudson river, that being then established as the easterly bounds of the city. In 1823, certain commissioners were authorized to construct a basin in the Hudson river, within the bounds of the city, and opposite to the docks fronting the harbor, extending from the state arsenal to the foot of Hamilton street, for the convenience of the commerce of the city, and the accommodation of the river and canal navigation. The land covered by the water of the basin has been conveyed by the state by letters patent to the commissioners. The construction of the basin has been completed at a heavy expense to the proprietors, and meets the most sanguine expectations of its pro-

jectors. The sixth section of the act of 1828, page 182, by which the act of 1826 is amended, makes it lawful for the corporation of Albany to order and direct the excavating, deepening, or cleansing any part of the basin in front of any pier lot, or any part of the Hudson river, in front of any wharf or pier lot; the expense of which shall be apportioned upon the lots benefited, and remain a lien until paid.

There can be no doubt the corporation have the legal power to remove the cause of the nuisance complained of, if that can be effected by deepening and cleansing the basin; and, I apprehend, it is impossible to distinguish, in reference to the subject in question, between their power and their duty. The former constitutes a part of the mass of corporate powers which they have sought for the promotion of the public good; the execution of which is not at their option. They are bound to execute them when demanded by the public interest. The means put within their reach for the purpose are ample, and exclusively under their control. It is well settled that when a corporation or an individual are bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty. An indictment and an information are the only remedies to which the public can resort for a redress of their grievances in this respect. If an individual has suffered a particular injury, he may recover his loss by an action on the case: 1 Hawk. Pl. Cr. 76, 369; 2 Chit. Cr. Law, 333, 352, 353, 603-605; 3 Burns' Just. 217; 5 Burr. 2700; Cowp. 86; 4 Bl. Com. 167. The definition of a nuisance confirms the above principle. A common nuisance, says Hawkins, seems to be an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires: 1 Hawk. 360; 4 Bl. Com. 166.

The bill of exceptions discloses, I think, that it was practicable, though perhaps at considerable expense, so to deepen and cleanse the basin in question as to remove the cause of the nuisance. The point was not as fully investigated on the trial as it should have been, and I admit is left open to criticism; yet the scope of the testimony given leads to the conclusion above stated. The bill states that there could be no effectual or permanent relief from the grievance complained of, unless the bulkhead, at the south end of the basin, is cut away; but may not the vigilant attention of the corporation in cleansing the basin answer the same end? If an object so important as the health and comfort of the population in that part of the

city can thus be attained, there is no good reason why this duty, in this respect, should not be rigorously enforced. The whole expense falls upon the owners of the pier lots, to which, no doubt, they would cheerfully submit, rather than risk the ultimate remedy referred to. It would be a public calamity seriously to impair the existing advantages to commerce and navigation derived from the use of the basin, and every reasonable effort should be made and required to remove the evil short of so serious a consequence

The court, I think, erred in instructing the jury that the defendants were bound to abate the nuisance, even if, to do so, it was necessary to cut down the bulkhead, and it applied the maxim that the public safety is the paramount law. This is, no doubt, the only principle that could countenance or excuse the act required of the corporation, as the basin and its appurtenances were constructed under the authority of a law of the legislature, which they were competent to enact. It is the rule of necessity which supersedes all law, and to be sustained in this instance, if at all, by the overruling principle of self-preservation. There is nothing in the charter of the city of Albany, making it the duty of the corporation to enforce this maxim, nor are we aware that it is ever enforced by the authority of law, through the medium of the judicial tribunals, or any other legally appointed body of men. The law of the land does not contemplate such an exigency, and, therefore, does not provide for it; if it had, it would no longer be the undefined law of necessity. The duty of the corporation to deepen and cleanse the basin, does not authorize them to cut down the bulkhead; nor is there any other power given by the charter of which we know, or to which we have been referred, that would authorize them to do so. Without authority from this source, they are no more bound to perform the act by a supposed law of necessity for the protection of the public health or comfort, than any individual citizen. They have no power but what is derived from their charter, or special acts of the legislature, relating to the city of Albany.

Judgment reversed.

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POWER OF MUNICIPAL CORPORATIONS TO REMOVE NUISANCES and to determine what is a nuisance, is discussed at length in the note to *Milne v. Davidson*, 16 Am. Dec. 194; see, on the same point, *City of Baltimore v. Hughes' Adm'r*, 19 Id. 243; *Tourne v. Lee*, 20 Id. 260; *Baker v. Boston*, 22 Id. 421. A municipal corporation having power by its charter to pass by-laws to prevent obstructions in a public stream, and to enforce the same by

penalties, not exceeding a certain sum, can not ordain a forfeiture, seizure, and sale of private property constituting such an obstruction: *Hart v. Mayor of Albany*, 24 Id. 165. Such a corporation can not be constitutionally empowered by its charter to pass ordinances authorizing the sale, without notice to the owner, of property left on a public levee beyond a certain time; but the corporation may authorize the removal of such property at the expense of the owner: *Lanfear v. Mayor*, 23 Id. 477. The doctrine of the principal case, that a municipal corporation can not, on the pretense that a structure erected within its limits, under authority of law, is a nuisance, summarily destroy the same without trial or notice to the owners, is approved in *Clark v. Mayor etc. of Syracuse*, 13 Barb. 40, 41, where it was held, accordingly, that the corporation of Syracuse could not thus summarily remove a dam constructed across Onondaga creek, under the authority of a special act of the legislature, on the pretense that said dam was a nuisance. The same general principle is referred to with approval by Miller, J., dissenting, in *Metropolitan Board of Health v. Heister*, 37 N. Y. 682, as being within the constitutional doctrine, that no person is to be deprived of his property "without due process of law."

**LIABILITY OF MUNICIPAL CORPORATIONS FOR INJURIES CAUSED BY THEIR NEGLIGENCE OF DUTY.**—See on this point the note to *Riddle v. Proprietors*, 5 Am. Dec. 43. In *Mower v. Leicester*, 6 Id. 63, it is held that no action lies at common law, against a town for damages occasioned by defective highways. The doctrine laid down in the principal case, that a corporation or individual, bound by law to repair a public highway or river, is liable to indictment for a neglect of that duty where a public injury results, and to an action on the case by one who sustains a particular injury, is approved in *Weet v. Trustees of Brockport*, reported in the note to 16 N. Y. 171; *Robinson v. Chamberlain*, 34 Id. 389; *Wendell v. Mayor etc. of Troy*, 39 Barb. 335; *Hyatt v. Trustees of Rondout*, 44 Id. 393. The same principle was held applicable to injuries arising from the defective construction or non-repair of sewers by municipal corporations, in *Mayor etc. of N. Y. v. Furze*, 3 Hill, 615; *Barton v. City of Syracuse*, 37 Barb. 295; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 469. The case is cited also in *Colegrove v. Harlem etc. R. R. Co.*, 6 Duer, 408, as an authority for the general doctrine that a corporation may be indicted or sued in trespass or trover. In *Mayor etc. of N. Y. v. Furze*, 3 Hill, 615, the principle above laid down, that where a power is conferred on a public corporation a corresponding duty and liability are imposed, is approved. In *Buckbee v. Brown*, 21 Wend. 117, Cowen, J., approves the ruling of the principal case, that the corporation of Albany was bound to keep the basin connecting the Hudson river and the Erie canal in repair.

**POWERS OF A CORPORATION ARE ONLY THOSE EXPRESSLY CONFERRED BY LAW, OR THOSE NECESSARY TO CARRY SUCH EXPRESS POWERS INTO EFFECT:** *People v. Utica Ins. Co.*, 8 Am. Dec. 243; *N. Y. Firemen Ins. Co. v. Ely*, 13 Id. 100; *Leggett v. N. J. etc. Co.*, 23 Id. 728. See, also, as to powers conferred by implication, where certain express powers are given to a corporation, *Attorney-general v. Stevens*, 22 Id. 528. In *Cooper v. Alden*, Harr. Ch. (Mich.) 86, the principal case is cited as an authority for the position that a municipal corporation possesses no powers except those conferred by its charter or by acts specially relating thereto.

## BUTLER v. MAYNARD AND PECK.

[11 WENDELL, 548.]

**BONA FIDE PURCHASER FOR VALUE, AFTER A LEVY of an execution takes the title subject thereto.**

**LEAVING THE PROPERTY IN THE DEFENDANT'S POSSESSION for a reasonable time, after a levy, without improper motive, is not *per se* fraudulent; but it is otherwise where there is unreasonable delay.**

**OMITTING TO PROCLAIM A LEVY, at the time, though by direction of the plaintiff, is not *per se* fraudulent, so as to impair the effect of the levy as against a *bona fide* purchaser.**

**REPLEVIN for certain flour.** The plaintiffs claimed the flour by virtue of a purchase made through their agent from one Knapp. The contract for the purchase was made October 4, 1831. The flour was delivered at Knapp's mill on October 18, and payment made, but most of the property was left in the mill. The defendants were judgment creditors of Knapp. Execution on their judgment was issued and delivered to the sheriff in August, 1831. On October 17, a deputy of the sheriff went with a witness to levy on the property in the mill. He went into every part of the mill, and examined and made an inventory of all the wheat and flour contained in it, including the flour in question, and a person was employed by one of the defendants to look after the property and see that it was not removed. He then went to his home, several miles distant, and was detained by official business until October 19, when he returned and locked up the mill with the flour in it. By direction of the defendants, the officer did not, at the time of the levy, make any proclamation or give any notice to any of the millers employed there, of his business, the defendants having some hope of arranging the matter with Knapp, and not wishing to injure his credit. It further appeared that the plaintiffs and their agent had no knowledge of the execution or levy before the flour was delivered to the said agent, and Knapp also testified that he had no knowledge of the issue of the execution or of the levy prior to that time. The judge instructed the jury that the levy was valid, but left it to them to determine whether the secret manner in which it was made had not operated as a fraud on the plaintiffs. Verdict for the plaintiffs, which the defendants moved to set aside, and for a new trial.

*S. Stevens*, for the defendants.

*J. A. Spencer*, for the plaintiffs.

By Court, NELSON, J. Before the revised statutes, the per-

sonal property of a defendant was bound from the time of the delivery of the execution against him to the sheriff, and the officer had a right to pursue and take possession of it, although it was afterwards sold and in the hands even of a *bona fide* purchaser: 2 Tidd, 914, 918, 920; 12 Johns. 403; 16 Id. 288. At common law the property was bound by relation from the teste of the writ, and a *bona fide* purchaser for a valuable consideration subsequent to such teste, could not hold it. To remedy the evil and injustice which frequently happened under this rule, the 29 Charles II., c. 3, sec. 16, was passed, which enacted that "no writ of *fi. fa.* or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff," etc. Our statute, 1 R. L. 501, sec. 6, is substantially a copy of this act; and the construction of it and practice under it the same. If the law stood thus, no question as to the right of property could have arisen in this case. By the revised statutes, 2 Rev. Stat. 366, sec. 17, it is provided that "the title of any purchaser in good faith, of any goods or chattels acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer, to be executed before such purchase was made." Since this statute, a *bona fide* purchaser of the property for a valuable consideration, at any time before the levy and without notice of the execution being issued, will acquire a complete title to it; and the question in this case must turn upon the validity of the levy actually made, assuming, as I shall, that the purchase was of the character above described.

We are of opinion, upon a view of the law as it stood before the revised statutes on this subject, and in order to determine the rights of all parties interested, by fixed and settled principles, as far forth as can be done consistent with these statutes, as well as to enable public officers to understand their duties, that the soundest construction to be given to them will be, to hold that any levy which in law is valid as against the defendant in the execution, and will justify a sale under it, will operate to defeat a subsequent purchase, though *bona fide* and for a valuable consideration. As we have already seen, the mere delivery of the writ to the sheriff heretofore had that effect. Now there must be an actual levy; but the statute uses this term as known and understood in the law, and means such a levy as is required before the property can be sold.

There are cases in this court in which it is decided that an unreasonable delay in completing an execution by the sheriff, at the instance of the plaintiff, or if for a great length of time without, will have the effect to postpone such dormant process to the process of a more vigilant junior creditor, and as a consequence, to the title of a subsequent *bona fide* purchaser for a valuable consideration: 5 Cow. 390; 4 Wend. 334. These cases, however, show that leaving the property in possession of the defendant for a reasonable time, and without any improper motive, after the levy, is not *per se* fraudulent, but the rights of the plaintiff and officer remain in full vigor. There is nothing then, in this case, in the fact of the flour being temporarily left in the possession of the defendant in the execution, which would go to impair the rights of the defendants. Was there anything in the manner of the levy which should have that effect? Every step was taken and act done that was necessary to constitute an actual levy within the strongest and most particular cases on this subject. The property was all inspected by the officer, and an inventory taken of it on the seventeenth day of October, and exclusive possession followed on the morning of the nineteenth, by locking up the mill. The deputy accounts for his absence until the evening of the eighteenth, by showing that he was engaged in official business as a magistrate at home, at the distance of nine miles from the place of the levy. Now, it is true that the deputy, when he levied, did not make a public avowal of it, and that one or both of the defendants desired he should not do so, as they were in expectation of an arrangement with Knapp, and did not wish to injure his credit if it took place. I am free to concede, if after this there had been an unreasonable delay in enforcing the collection of the debt under the execution, that within the rule of the cases above cited, it would have become dormant, and the title under it postponed to the claims of *bona fide* purchasers; but I can not admit that this omission of the officer, whether directed or not at the time of the levy, was *per se* fraudulent. It would be introducing into the execution of this process a new rule that must place the validity of a levy in every case upon debatable ground; it would be putting it as well upon the degree of publicity given to acts done as to the acts themselves. In England the sheriff takes actual possession of the goods upon the levy, by means of one of his assistants: 1 Arch. 293; but here, the officer is not presumed to have any attendant, and his own indorsement upon the writ is frequently the only evidence in



his power of the levy. It must often be made without any one being present but the officer, and circumstances may sometimes even justify a premeditated concealment for a time from the defendant in the execution, to prevent waste or removal of the property until it can be secured. If a party should stand by and see the property purchased, after the levy, without making it known, a different question would arise subject to other considerations and principles. All I mean to say is, that the mere circumstance of the officer's omitting to proclaim or give notoriety to his levy at the time it is made, is not, of itself, fraudulent, so as to impair its effect. Any other rule would put it in the power of the defendant in the execution, under the revised statutes, greatly to embarrass, if not defeat, this process, unless possession immediately followed. He could always sell to a *bona fide* purchaser as soon as he knew of the levy, and be himself the witness to establish the absence of its notoriety, leaving the officer to defend himself in the best way he could.

New trial granted.

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EXECUTION BINDS PERSONALTY, FROM WHAT TIME.—See, on this subject, *Beals v. Guernsey*, 5 Am. Dec. 348; *Tabb v. Harris*, 7 Id. 732; *Haggerty v. Wilber*, 8 Id. 321; *Cresson v. Stout*, Id. 373; *Beals v. Allen*, 9 Id. 221; *Green v. Johnson*, 11 Id. 763, and note; *Jones v. Jones*, 18 Id. 327; *Palmer v. Clarke*, 21 Id. 340; *Hanson v. Barnes' Lessee*, 22 Id. 322; *Collingsworth v. Horn*, 24 Id. 753; *Million v. Riley*, 25 Id. 149.

THAT ONE PURCHASING CHATTELS AFTER AN EXECUTION against the vendor has been delivered to the sheriff, but before it is actually levied, without notice of such execution, and in good faith, will be protected, is held, approving the dictum in the principal case, in *Birdseye v. Ray*, 4 Hill, 162, and incidentally in *Burkhardt v. Sanford*, 7 How. Pr. 337. But an actual levy defeats the title of a subsequent *bona fide* purchaser for value: *Fuller v. Allen*, 7 Abb. Pr. 15; S. C., 16 How. Pr. 248; *Bond v. Willett*, 29 Id. 53; S. C., 1 Keyes, 387.

LEAVING DEBTOR IN POSSESSION AFTER LEVY is considered, in England, a badge of fraud, but it is not in Pennsylvania, especially with respect to household goods, though it has not been determined how long the debtor may retain them: *Commonwealth v. Stremback*, 24 Am. Dec. 351. Levying an execution, and taking a receiptor, changes the possession of the goods in contemplation of law, without an actual removal: *Phillips v. Hall*, Id. 108. In *Ray v. Harcourt*, 19 Wend. 497, it is held, affirming the doctrine of *Butler v. Maynard*, that it is not necessary that an officer levying on goods should remove them, or leave an assistant in possession, but that they may be left with the defendant, at the risk of the plaintiff or of the officer, or that security for its delivery may be taken. So in *Bond v. Willett*, 1 Keyes, 381, where it is said: "So long ago as the case of *Butler v. Maynard*, 11 Wend. 548, it has been held that leaving the property in possession of the debtor for a reasonable time, and without an improper motive, after the levy, was not fraudulent, but the rights of the plaintiff and officer remained in full vigor. It is not necessary that the officer should measure or weigh the

goods, or ascertain the exact quantity of each before the levy is complete. That he can do afterward, if necessary, before the sale." In *Sage v. Woodin*, 66 N. Y. 584, it is held, citing the principal case, that where, by unreasonable delay, an execution becomes dormant as to other creditors, it becomes dormant also as to *bona fide* purchasers. So in *Conway v. Jett*, 24 Am. Dec. 590, it was determined that the lien of an execution is lost by unreasonable delay. See also other decisions in this series cited in the note to that case.

TO CONSTITUTE A VALID LEVY the goods must be under the view and within the power of the sheriff; and a proclamation of a levy upon goods looked up and not within his view is no levy: *Haggerty v. Wilber*, 8 Am. Dec. 321; *Beekman v. Lansing*, 20 Id. 707, and cases cited in the note thereto. The officer's acts must be open, public, and unequivocal, and such as to subject him to an action of trespass if it were not for the execution: *Beekman v. Lansing*, *supra*. A secret levy on goods left on the premises in the debtor's possession, will not bar the landlord's claim for rent where the debtor is his tenant for nearly a year afterwards: *Id.* As to what constitutes a valid levy, the principal case is cited in *Camp v. Chamberlain*, 5 Denio, 203, and *Bank of Lansingburgh v. Crary*, 1 Barb. 546. In *Ray v. Harcourt*, 19 Wend. 497, it is said that there was no intimation in the principal case that an execution debtor might so waive a levy as to constitute it in law an actual levy as against creditors and purchasers, but the contrary. In *Baker v. McDuffie*, 23 Id. 291, it is held, citing *Butler v. Maynard*, and also *Ray v. Harcourt*, *supra*, that a levy under a *fi. fa.* may be valid as against the defendant without the property being in view of the officer, if assented to. A direction by the creditor to the officer to keep the levy a secret from the debtor was decided, in *Price v. Shipp*, 16 Barb. 585, to be equivalent to a direction to delay, and to render the execution dormant as against a *bona fide* purchaser; and referring to the principal case, the court said: "The case of *Butler v. Maynard*, 11 Wend. 548, relied on by the defendant, is not analogous to the present one. In that case the instruction to the officer was simply not to make his business public; no direction was given not to inform the debtor; an actual levy was made, and two days thereafter exclusive possession taken in pursuance of it, and the delay of two days was fully excused. The instruction did not prevent the officer acquiring absolute dominion over the property, and no delay was in fact produced by it. It is probable the instructions prevented the levy from being made as public as it might otherwise have been, but beyond that it does not appear to have had any effect."

## PEOPLE EX REL. SMITH v. PECK AND WORTENDYKE.

[11 WENDELL, 604.]

APPOINTMENT OF PERSONS TO PRESIDE AT AN ELECTION OF TRUSTEES OF A CHURCH, who are not elders or church-wardens, is illegal, under 3 Rev. Stat. 292, unless there are no such officers present.

TERM "ELDERS" IN THIS STATUTE DOES NOT INCLUDE PREACHERS in the Baptist church, though commonly called elders.

REGISTER OF THE MEMBERS IS NOT THE ONLY EVIDENCE as to the number of qualified electors at elections under this statute, but parol proof is admissible, especially where it does not appear that a register is in existence.

CERTIFICATE OF SUCH AN ELECTION SIGNED AT ANY TIME afterwards, is admissible evidence, though another certificate has been given.

STATUTE REQUIRING THE PRESIDING OFFICERS TO CERTIFY the result of the election immediately is directory.

OMISSION TO GIVE NOTICE OF SUCH AN ELECTION, in all respects as required by statute, does not invalidate the election, if fairly conducted, and if all the members are present.

INFORMATION in the nature of a *quo warranto*, charging the defendants with having usurped the office of trustees of the Bethel Baptist Church. It appeared at the trial at the circuit that the defendants, at an election held January 1, 1831, and presided over by Messrs. Brown and Verbryck, two deacons or elders of the church, were nominated by Mr. Knapp and chosen without dissent. Another poll was held at the same time and place and presided over by Messrs. Hawley and Thompson, at which another set of trustees was chosen. The facts concerning these rival elections sufficiently appear from the opinion. It appeared that the election was held to fill two vacancies in the board of trustees; that the secretary of the board gave Mr. Chace, the pastor, notice of the election two or three weeks beforehand, but did not state the names of the trustees whose term had expired; and that the election was afterwards announced once from the pulpit. The defendants had received two certificates of their election, one made out immediately, and one about six months afterwards. One of them was offered in evidence, but the clerk of the trustees could not say whether it was the first one or the second. It was received against the objection of the relators. The judge also admitted parol proof as to the number of the members of the church, against the objection of the relators. The substance of the judge's instructions as to the validity of the notice, etc., is sufficiently stated in the opinion, together with some additional facts. Verdict for the defendants, and a motion for a new trial, founded on exceptions to the rulings of the circuit judge.

*S. Sherwood*, for the relators.

*F. B. Cutting and S. P. Staples*, for the defendants.

By Court, SAVAGE, C. J. The plaintiffs ask for a new trial on several grounds involving the regularity of the election of the defendants, as trustees of the Bethel Baptist Church, in the city of New York.

The act to provide for the incorporation of religious societies, 3 Rev. Stat. 292, directs the mode of proceeding to create a corporation, and to continue it. By the third section, which

is applicable to this case, it is the duty of the minister, if there be one, to notify publicly the congregation of the time and place of holding an election for the choice of trustees. The place shall be the church, or place of meeting for divine worship; the time shall be fifteen days or more after the notice, which is to be given for two successive Sabbaths preceding the day of election. On the day of the election, two of the elders or church wardens shall be chosen to preside as inspectors of the election; if there are no such officers, then two of the members of the church, to be nominated by a majority present, shall preside at such election; and the presiding officers shall immediately thereafter certify the names of the persons elected as trustees; which certificate is directed to be acknowledged and recorded. The sixth section provides for the continuation of the corporation. It directs that the trustees first elected shall be divided into three classes, so that one third may be elected annually. It is made the duty of the trustees, or a majority of them, at least one month before the expiration of office of any of the trustees to notify the same to the minister, or, in case of his death or absence, to other officers of the church, specifying the names of the trustees whose terms will expire, and it is made the duty of such minister or other officers, in manner aforesaid, to notify the members of the church of such vacancies, and appoint the time and place for the election of new trustees to fill up the same, which election is to be held at least six days before such vacancies shall happen; and all such subsequent elections are directed to be held and conducted by the same persons, and in the manner before directed. The seventh section declares the qualification of voters at such elections, and makes it the duty of the clerk of the trustees to keep a register of the names of all persons who desire to become stated hearers, with the time when their request was made, and to attend the elections for the purpose of testing the qualifications of electors.

It appears by the case, that on the first of January, 1831, an election was held for the choice of two trustees. Two clergymen officiated in this church, and both attended the election; much confusion prevailed; two polls were held in the church at the same time, and two sets of trustees were elected. The defendants received a certificate of their election, and were admitted as members of the board of trustees. The object of this suit is to oust them from their seats.

It seems that for some time previous to the election in ques-

tion, there were two parties in the church; one denominated the Chace party, consisting of those adhering to Mr. Chace, the clergyman of the church; and the other opposed to him, denominated the Knapp party, Mr. Knapp taking an active part against Mr. Chace; that Mr. Chace had selected the morning of the day of election as a suitable time to make an address to the scholars of the Sunday-school, and thus had assembled a large congregation of persons of all ages and sexes, except that portion of the congregation opposed to himself, and who had worshiped separately from his party, but were members of the congregation, and had a right to participate in the choice of trustees. It seems, too, that he thought proper to proceed to the choice of trustees, without dismissing his congregation. With a law book in his hand, he said that they would proceed according to law; and stating that he had read the law, he nominated two persons to act, one as moderator and the other as clerk, and putting the question, declared it carried. The persons thus nominated placed themselves at a table, and were proceeding, as some of the witnesses state, to take votes, when Mr. Knapp and others objected, alleging that they were improper persons to preside. After some confusion, Knapp nominated two of the elders or deacons of the church as inspectors, and put the question, which was carried. A scuffle then ensued for the table, but the moderator and his clerk kept it, though Knapp's party obtained the balloting-box, and retired into a pew, a few feet distant; when both polls were opened, and two sets of trustees were chosen. It seems, also, that after the moderator and clerk were chosen, instead of proceeding directly to their business, they read certain church resolutions, which had been passed that morning, and the reading of which was called for by Mr. Chace.

It is impossible to read this case without being struck with the indiscretion (to say the least) with which the business was conducted. A religious exercise upon such an occasion was without precedent in that church, as testified to by one of the witnesses; and it was probably known that a portion of the congregation were not in the church, and were waiting at the door for the conclusion of the religious exercises; and yet, without any dismissal of the church, or suspension of business, the pastor, without leaving the pulpit, nominates the officers to preside at the election. He stated that he was about to proceed according to law, and nominated officers in contravention of the

Perhaps the circuit judge was right in considering the officers nominated by Mr. Chace, as the presiding and inspecting officers of the election, whatever might be the names given to them; but if so, why were not the persons designated in the statute selected? Such persons were present, and the selection and appointment of any others was improper and illegal. There is no pretense that Mr. Thompson was an elder of the church; nor do I think that Mr. Hawley was an elder, within the meaning of the statute—he was a preacher, an associate minister with Mr. Chace. I am aware that the clergymen in the Baptist church are called elders, but the statute did not mean the clergy, but subordinate officers known by that title; the clergyman has no duty assigned him in conducting the election, but simply to read the notice for two successive Sabbaths. The legislature evidently did not intend or expect any active interference by the clergy; and this case calls for the further remark, that the impropriety of such interference was never more strongly exemplified. As soon as the moderator and clerk were prepared for business, instead of permitting them to take votes for trustees, Mr. Chace insisted on having the resolutions above referred to read; instead of acting as the messenger of peace, he was the first to throw the apple of discord; “then,” says Mr. Hawley, “the disturbance began.” But it is not my business to comment upon the conduct of the parties concerned, only so far as it affects the question now before the court.

I have no hesitation in saying that the appointment of Messrs. Hawley and Thompson, as presiding officers, was illegal, unless there had been no elders of the church present; their nomination was objected to, and was altogether improper. The nomination made by Mr. Knapp of two of the elders of the church was not opposed, but was carried; Messrs. Brown and Verbryck were therefore the only persons regularly appointed presiding officers; theirs was the only poll regularly open to receive votes, and they were the only persons present, who had a right to certify as the persons chosen. The statute is too clear to admit of a doubt. If there are elders or church wardens present, they, and they alone, must be appointed to preside; if there are no such officers, then two of the members of the church may be chosen. The verdict of the jury was right, and in my opinion, is well supported by the testimony; and unless there was some misdirection of the judge, the verdict can not be disturbed.

I will therefore consider the objections to the decisions and

charge of the judge, in the order in which they are presented in the plaintiff's points:

1. He admitted parol proof of the number of the electors. The statute makes it the duty of the clerk of the trustees to keep a register of the names of the stated hearers of the church, and of the time when they became so. The object is to test their right to vote, and that is the only use to which the register is required to be put; it does not prevent the introduction of parol proof as to the number of the members of the church. Besides, it did not appear that any such register was in existence.

2. There is surely no weight in the objection to the certificate of the inspectors; two had been made; one soon after the election, the other some months afterwards; they were alike, and either was sufficient. And I also concur in the opinion that a certificate signed at any time after the election would be proper evidence.

The statute is directory to the presiding officers to certify the result immediately; but should they refuse or neglect to do so, the church is not to be without officers: the votes of the members can not thus be rendered ineffectual.

3. The judge stated to the jury that the election was not necessarily void because the notice given by the trustees to the minister was less than one month, etc., and did not contain the names of the trustees whose seats became vacant, and was not announced for two successive Sabbaths, provided the election was fairly conducted, and all in fact had notice; but if the omissions were fraudulently made, or the election had thereby been prejudiced, then the omissions should invalidate the election. All this I think is sound doctrine. In *The People v. Bunkel*, 9 Johns. 158, the court say, we must give the statute a reasonable and liberal construction, for the benefit of the churches: See also 6 Cow. 23. The object of the notice is, that the voters may be fully apprised of the election, and may attend and exercise their rights. There is no pretense in this case that every voter was not present, for they appear to have come from a distance; the time was well understood, and had been the same for many years. No evil resulted from the omission, if there was any; no fraud was imputed; and all parties attended, and thereby admitted notice.

New trial denied.

Dec. 131. The principal case is referred to as an authority on this point in *Russell v. Hubbard*, 6 Barb. 656; *Juliaud v. Rathbone*, 39 Id. 101; *Barnes v. Badger*, 41 Id. 99; *People v. Cook*, 14 Barb. 292; S. C., 8 N. Y. 89; *People v. Supervisors*, 34 Id. 273; *Carpentier v. Willet*, 1 Keyes, 517; *Stevenson v. Mayor etc. of New York*, 1 Hun, 54; S. C., 3 N. Y. Sup. Ct. (T. & C.) 136; *Tuohy v. Chase*, 30 Cal. 527.

IRREGULARITIES AS TO NOTICE OF AN ELECTION of trustees of a church, or even the omission of such notice, do not invalidate the election: *Madison Avenue Baptist Church v. Baptist Church*, 1 Sweeny, 118, citing the principal case. So, of elections of school officers by inhabitants of a district, where the meeting has been duly ordered: *Marchant v. Langworthy*, 6 Hill, 648. In *McCune v. Weller*, 11 Cal. 49, it was held, however, that the direction of the statute, that the governor should issue his proclamation for an election to fill a vacancy in the office of district judge, was mandatory, and that the omission to do so invalidated the election. Baldwin, J., in delivering the opinion, thus refers to the principal case: "In *People ex rel. Smith v. Peck*, 11 Wend. 605, the principle declared in the head-note is, that an election of trustees of a church is good, although the requirements of the statute in respect to the notice of such election have not been complied with, provided the election was fairly conducted, and there is no complaint of want of notice. But this note of the reporter is broader than the decision of the court, for Judge Savage says: 'The judge stated to the jury that the election was not necessarily void because the notice given by the trustees to the minister was less than one month, etc., and did not contain the names of the trustees whose seats became vacant, and was not announced for two successive Sabbaths,' etc." In *First Baptist Society v. Rapalee*, 16 Wend. 606, the court refer to the doctrine laid down in the principal case, *arguendo*, that the statute relating to the incorporation of religious societies is to receive a liberal construction in favor of such societies, and say that this does not mean that the court is to "legislate in favor of churches."

THE PRINCIPAL CASE IS CITED ALSO in *Erickson v. Smith*, 38 How. Pr. 471, as to the effect of a certificate given by an officer as evidence. It is referred to also in *People v. Albany etc. R. R. Co.*, Id. 246; S. C., 7 Abb. N. S. 283; 55 Barb. 363, as an authority for the position that surprise and fraud upon the part of the electors at an election of officers of a corporation will invalidate it; and in *Hart v. Harvey*, 19 How. Pr. 249; S. C., 10 Abb. Pr. 325, and 32 Barb. 59, to the point that the list or register provided for by statute is not the only evidence as to who are qualified electors at an election of trustees of a religious corporation, when the validity of such election is drawn in question.

## CRARY v. SPRAGUE AND CRAW.

[2 WENDELL, 41.]

DECLARATIONS OF PARTIES WHILE ENGAGED IN A COMBINATION to procure a fraudulent sale of a debtor's goods are admissible as part of the *res gestæ* to prove such combination, in an action by a defrauded creditor who had a bill of sale of the goods, against a purchaser at such sale.

PARTY CALLING A WITNESS INTERESTED AGAINST HIM IS ESTOPPED from objecting to his competency and credibility, only so far as that trial is concerned.



**TESTIMONY OF AN INTERESTED WITNESS, SINCE DECEASED, CAN NOT BE PROVED**, in a second trial, by the party in whose favor he was interested, against the objection of the other party, though he was the latter's witness on the first trial.

**ADMISSION OF INCOMPETENT TESTIMONY IS NO GROUND FOR A NEW TRIAL** when the same facts were sufficiently proved by competent testimony.

**FRAUDULENT EXECUTION SALE PROCURED BY A COMBINATION** between the debtor and others to defeat the claim of a lien creditor, is void as to him, where the purchaser has notice of his claim.

**EXECUTION SALE OF PROPERTY FOR A GROSSLY INADEQUATE PRICE** is a strong circumstance to show fraud.

**TROVER** for certain goods. The plaintiff claimed the property in question under a bill of sale from John L. and Lewis Shearer, executed August 12, 1826, to secure a certain indebtedness. An execution against the Shearers in favor of the bank of Troy had been delivered to the sheriff before the bill of sale was executed. The plaintiff paid a small sum on this execution, and in March, 1827, after the property had been advertised for sale, procured a postponement by promising to pay off the execution as soon as he could obtain an assignment of the judgment. A combination appeared from the evidence to have been entered into about that time between John L. Shearer, Hosea Adams, and one Gregory, to defeat the plaintiff's claim, for the purpose of procuring payment of a judgment for one hundred and thirty-one dollars and fifty-two cents, recovered by the Washington and Warren Bank against Adams and Gregory, as indorsers for John L. Shearer. To carry out this scheme, Gregory purchased the property in question for one hundred and eighteen dollars and forty-one cents, on the execution sale in favor of the Bank of Troy, which sale was made April 7, 1827. The money for the purchase was obtained from Adams' son, in whose favor Gregory confessed a judgment June 18, 1827. This judgment, as well as that in favor of the Washington and Warren Bank, was assigned, at Gregory's request, to Sprague, one of the defendants. Executions were issued forthwith on both judgments, with Gregory's consent, and were levied on the property now in question, which still remained in the Shearers' possession, and the property, the value of which was about seven hundred and seventy-one dollars and fifty cents, was sold on the executions June 30, 1827, Gregory urging on the sale. In addition to other evidence to prove the combination, the judge admitted evidence of certain declarations made by Gregory and John L. Shearer, against the objection of the defendants. John L. Shearer was called as a witness by the defendants on a former trial of this cause, and having since

deceased, the plaintiff was permitted to prove his testimony at such former trial, to show the combination referred to, though the defendants objected, and offered to prove that at the time of testifying, Shearer was interested in favor of the plaintiff. Other facts are stated in the opinion. The judge instructed the jury, that although the lien of the execution in favor of the Bank of Troy was prior to the plaintiff's claim, the latter could not be, by a hurried and fraudulent sale, deprived of his right to pay off that lien, and that if there was such fraud, the jury should find for the plaintiff. Verdict for the plaintiff, which the defendants moved to set aside, and for a new trial, on exceptions to the judge's rulings.

*C. F. Ingalls*, for the defendants.

*S. Stevens*, for the plaintiff.

By Court, NELSON, J. The admissions of McGregory and Shearer, as proved on the trial, were clearly competent evidence as part of the *res gestæ* constituting one of the principal points litigated between the parties. The property taken and sold upon the execution against McGregory and Adams was not found in the possession of either of them, but of the Shearers; and it became necessary, therefore, for the defendants to prove title to the property in themselves, or in one of them. To show property in McGregory, a sale, under the Troy Bank execution, at which McGregory was the purchaser, was attempted, and must be sustained or the defendants must fail. What was necessary to be proved by one party, might be disproved by the other. McGregory and John L. Shearer were the principal actors in the transaction relative to the Troy Bank execution, as is abundantly proved by Lewis Shearer. Their acts, and of course their declarations at the time while engaged in bringing about a sale and accomplishing the avowed object of it, were undeniably competent and pertinent. It is conceded their acts were so, and that their declarations, to the extent claimed and proved, were admissible, stands upon as clear and well-settled a principle of evidence. They were a constituent part of, and gave character to the transaction or sale: 1 Phil. Ev. 202; 1 Stark. 39, 47.

If the testimony of John L. Shearer, on the former trial, had been used by the plaintiff, and the objection to its competency on the score of the interest of the witness had been made by the defendants, now for the first time there would be some plausibility, if not in force, in the argument, that had it been

made before, the witness might have been released; now it is too late. Even under this view of the question, I will not say it would be decisive; for the evidence of the former testimony is admitted only from necessity, and is justly liable to many exceptions; and it seems even still to be questioned by high authority if it be admissible at all in a criminal case: 2 Hawk. 606, sec. 12; Peak. Ev. 60, though I think it would. Eminent judges have cast a doubt over the soundness of the rule, and Lord Kenyon confined its operation to an almost impracticable strictness, evidently from the danger of its great facility to abuse: 1 Phil. Ev. 199, 200, Gould's ed.; 2 Johns. 21, *per* Livingston, J.; 14 Mass. 234; 6 Cow. 162. It will not be allowed, unless the witness be dead, and his death affirmatively shown. Even diligent inquiry, without being able to find the witness, is not sufficient, though it is obvious there can scarcely be a shade of difference between the two cases (death and absence), either in principle or hardship. I mention these circumstances to show the great strictness with which the rule is guarded by the courts. But the argument against permitting proof of the interest of the witness, where the same party who introduced him on the former trial offers his testimony, after his decease, in the same cause, does not apply to this case. This is the first time the plaintiff has sought to use the testimony of this witness; and I am unable to discover any reason why his adversaries shall not be permitted to take every legal exception to it that they might have taken had he been living and before the court. It can not be said that the plaintiff would have improved<sup>1</sup> him on the former trial, if the defendants had not; and then, if objected to, he could have been released; for we can not now take his assertion, when it is his interest to make it, and we are not at liberty, in the absence of proof, to presume that the plaintiff would have called the witness; and more especially, we can not presume that he would have submitted to the sacrifice of making him a competent witness by release. The case assumes that he was interested in the event of the suit.

The admission of the testimony at the circuit was put on the ground that the defendants, by introducing the witness on the former trial, had declared his competency and credibility, and thereby precluded themselves from questioning either. This was undoubtedly true, so far as that trial was concerned: 1 Phil. Ev. 213; but no farther. Independently of that trial, Shearer was not the witness of the defendants, unless they

1. The word "offered" or "introduced" was probably intended to be used here, instead of "improved."

again chose to make him such. Had he been living and been introduced by the plaintiff on the second trial, it could not for a moment be contended that the defendants were not at liberty to take any exceptions to his testimony; and yet the argument would seem to be pushed to this extent. I am aware a distinction is taken between a living witness and the testimony of one deceased; but I have already endeavored to give the answer to it in this particular case. The position of a cause at the circuit sometimes makes it expedient, in a choice of evils, for a party to risk the testimony of a witness interested against him, and as to that trial he must abide the consequences; but if the experiment has proved that the choice was an unwise one, it would be a hard measure of justice to say the witness should ever after be not only a competent, but a credible witness in the cause for his adversary, whether dead or alive. The decease of Shearer may be a misfortune to the plaintiff, but that is no reason for throwing that misfortune on the defendants; nor is the fact that the plaintiff has once had the benefit of the testimony of an interested witness, a reason why it should be repeated. There is no force in the position that a party who has used a witness interested against him should afterwards, on a second trial, be estopped from excepting to him, on the ground that he is practicing a fraud upon the court. The rule of evidence here alluded to has no application to the case: 1 Phil. Ev. 213. It would be somewhat difficult to make fraud out of the act of a party in calling a witness on a trial interested against him.

The judge erred in admitting the testimony of J. L. Shearer; but, notwithstanding, I am of opinion there ought not to be a new trial, and that the jury were bound to render their verdict for the plaintiff independently of that testimony, on the ground that the first sale was fraudulent and void. The evidence of Lewis Shearer, Noble, and Maxwell proved every fact contained in the statement of John L. Shearer, and much more fully and explicitly than was testified to by him, according to the account given of his testimony. The manner of selling the property, and the circumstances under which it was sold by the deputy sheriff, were highly exceptionable; and if supported, would result in an enormous sacrifice. Property to the amount of near eight hundred dollars was sold for one hundred and eighteen dollars—a strong circumstance that all was not fair, especially when there is no satisfactory evidence that the plaintiffs in the execution were pressing, and the plaintiff in this cause besides had passed his word that it should be paid.

Laying entirely out of view the testimony of John L. Shearer, it is impossible, upon the whole case, to doubt that here was a deliberate and fraudulent combination between the parties to the first sale to defraud the plaintiff in this cause; and it would be discreditable to the administration of justice, to give countenance to such a perversion of the judgment and process of the court.

The defendants are not entitled to any peculiar protection or favor, as they can not be deemed *bona fide* purchasers. They were fully advised of the claims of the plaintiff, and were obliged to indemnify the sheriff before he would hazard a sale. Under the circumstances of the case, in contemplation of law, they stand in no better situation than McGregor, being chargeable with notice of his fraud, and having chosen to take the risk of it.

The following are authorities for denying a new trial, notwithstanding the error of the judge. To induce the granting of a new trial, there should be strong probable grounds to believe that the merits have not been fully and fairly tried, and that injustice has been done: 3 Johns. 532, 533; 2 Cai. 90; 5 Johns. 138; 8 Wend. 672; 2 T. R. 4; 1 Bos. & Pul. 339; 1 Taunt. 12. No such grounds exist in this case.

New trial denied.

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DECLARATIONS OF PARTIES TO A COMBINATION to defraud creditors, admissibility of: See *Reitenbach v. Reitenbach*, 18 Am. Dec. 638. The principal case is recognized as an authority for the admissibility of the declarations as well as the acts of parties to a combination for a fraudulent purpose, as evidence of such purpose, in *Shoemaker v. Benedict*, 11 N. Y. 195; *Cuyler v. McCartney*, 40 Id. 245, *per* Daniels, J., dissenting; *Bullis v. Montgomery*, 3 Lana. 260. In the case last cited, however, the court of appeals held that the rule laid down in *Crary v. Sprague* on this point was not applicable, because there the declarations were not contemporaneous with the alleged fraudulent acts: *Bullis v. Montgomery*, 50 N. Y. 358. In *Osborn v. Robbins*, 37 Barb. 483, it was said that the declarations in the principal case were admitted because they "related and gave character to the possession of the property in dispute, and were strictly concomitant with, and 'were calculated to unfold the nature and quality' of the principal part, to wit, the possession which they were intended to explain." In that case the doctrine of *Crary v. Sprague* was relied on as authorizing the admission of certain declarations made between the original payees and one of the makers of a note respecting the giving of such note, in an action brought by a subsequent holder; but the court held the doctrine inapplicable because the declarations were made after the transaction was finished, and after the parties had left the office where the note was given, and were therefore not part of the *res gesta*.

PARTY CALLING A WITNESS INTERESTED ADVERSELY TO HIM, for examination on a particular point, admits his credibility, and the other party may examine him generally: *Varick v. Jackson*, 19 Am. Dec. 571, and note.

TESTIMONY OF ABSENT OR DECEASED WITNESS AT FORMER TRIAL, when may be proved: See *Magill v. Kauffman*, 8 Am. Dec. 713, and note; *Drayton v. Wells*, 9 Id. 718. In *People v. Newman*, 5 Hill, 296, the principal case is cited to the point that nothing but the death of a witness can let in proof of his testimony as given on a former trial. In *United States v. Macomb*, 5 McLean, 289, it is cited to the point that proof of the testimony of a deceased witness, given on a previous trial, is admissible even in a criminal case.

ADMISSION OF INCOMPETENT EVIDENCE is held, in *State v. Allen*, 9 Am. Dec. 616, to be ground for reversal, though there was other legal evidence to justify the verdict, because it can not be known on which the jury relied. In *Hanly v. Blackford*, 25 Id. 114, it is held that a decree will not be reversed for the improper admission of a deposition, if there was other proof to support it. In *Weeks v. Lowerre*, 8 Barb. 534, it was held that the admission of illegal testimony, which might have had weight with the jury on a material point, was a ground of reversal on a bill of exceptions, and that the court had no discretion to refuse a new trial, because there was other evidence to support the verdict; and Mitchell, J., said: "A different rule may prevail in a case made, which is addressed more to the discretion of the court, than a bill of exceptions. Such are all the cases quoted in *Crary v. Sprague*, 12 Wend. 47. That case, it is true, was on a bill of exceptions; but the judge apparently overlooked that fact, for he speaks of it as an application for a new trial, pp. 46, 47. On another ground also his decision may be correct, viz.: that from other issues clearly proved, the matter improperly proved became immaterial." But in a number of cases it has been held, citing the decision in *Crary v. Sprague*, that a judgment will not be reversed on the ground of the admission or rejection of improper or illegal testimony, where the court can clearly see that there is sufficient competent evidence to support the judgment, and that no injustice has been done by the erroneous ruling: *Bort v. Smith*, 5 Barb. 286; *Page v. Ellsworth*, 44 Id. 640; *Renaud v. Peck*, 2 Hilt. 144; *Taylor v. Church*, 1 E. D. Smith, 285; *Forrest v. Forrest*, 3 Abb. Pr. 158; *Milliner v. Lucas*, 3 Hun, 498; S. C., 5 N. Y. Sup. Ct. (T. & C.) 579; *Howell v. Van Siclen*, 6 Hun, 121. So even on a bill of exceptions: *Wells v. Cone*, 55 Barb. 589. But especially where the whole case is before the appellate court: *Trimmer v. Trimmer*, 13 Hun, 183.

In *Clark v. Brooks*, 2 Abb. Pr., N. S. 388; S. C., 2 Daly, 163, the principal case is cited on the same point, but it is said that the New York decisions respecting it are by no means harmonious. In *Buck v. Waterbury*, 13 Barb. 118, and *Norman v. Manciette*, 1 Sawy. 438, *Crary v. Sprague*, is relied on as an authority for the general rule that a new trial will not be granted because of an erroneous ruling, when the court can see that no injustice has been done, and that no just end will be subserved by a re-trial.

FRAUDULENT EXECUTION SALE conveys no title as against creditors. See *Farr v. Sims*, 24 Am. Dec. 396, and note; see, also, *Gilbert v. Hoffman*, 26 Id. 103, and note. In *Speer v. Skinner*, 35 Ill. 298, the principal case seems to have been referred to by counsel as an authority for holding a certain execution sale fraudulent, as against a particular creditor; but the court distinguished the two cases, saying, that while in the principal case the sale was concerted and made with the avowed object of defeating the interest of the third person, it was not so in the case before the court, there being no evidence of a combination, the sale having been conducted under the direction of the party entitled to the proceeds, and the interest of the party alleged to have been defrauded having been regarded.

## SAYLES v. SMITH.

[12 WENDELL, 57.]

**ADMISSION OF ANOTHER'S TITLE TO LAND, WITH AN AGREEMENT TO PURCHASE** from him, estops a party and his assignee from setting up a prior title in himself, where there has been no mistake or imposition.

**FORECLOSURE SALE ON SUNDAY IS NOT A JUDICIAL PROCEEDING**, and therefore is not void, unless prohibited by statute.

**EVEN THOUGH SUCH A SALE WOULD BE VOID**, THE NOTICE of it would not necessarily be void, and the creditor may postpone the sale.

**EJECTMENT.** The plaintiff, at the trial at the circuit, produced a sheriff's deed to himself for the premises, dated June 30, 1830, made upon an execution sale on a judgment in his favor against one Mattison, docketed October 14, 1819, and a conveyance from Mattison to Bradley, dated June 2, 1820, and proved that the defendant was in possession, claiming as assignee of Sheldon Smith, and that the latter had admitted Bradley to be the owner, and had agreed to purchase from him when he got his deed from Mattison. The defendant gave in evidence a deed from Mattison to Sheldon Smith, dated February 14, 1814, which was received against the plaintiff's objection. The plaintiff then proved a mortgage from Sheldon Smith to Mattison, and a statute foreclosure and sale of the premises under such mortgage, upon which a deed was executed to the purchaser February 21, 1820, and a conveyance to Mattison by the purchaser on the same day. The notice of foreclosure stated that the sale would take place on February 20, which was Sunday, which fact was discovered on February 14, and on that day a postponement to February 21 was published. The plaintiff, being nonsuited on the defendant's motion, now moved to set aside the nonsuit.

*J. A. Spencer*, for the plaintiff.

*D. Cady*, for the defendant.

By Court, SAVAGE, C. J. There are two points in this case made by the plaintiff: 1. That as both parties claimed title from Mattison, the defendant, through Bradley, whose tenant he was, and with whom he entered into a contract to purchase, at the time when Bradley took a deed from Mattison, the defendant was estopped from denying that the title was in Mattison when he conveyed to Bradley. 2. That the foreclosure of Sheldon Smith's mortgage was regular, and revested the title in Mattison.

1. The defendant stands in no better situation than Sheldon Smith; and he could not deny the title of Bradley, who purchased of Mattison on June 2, 1820. At that time he admitted the title in Bradley, as derived from Mattison; yet he now pretends that at that very time, and for six years before, he was and had been the owner himself. If he had then the title, it was his duty to have asserted it, instead of admitting it in Mattison; he was estopped from setting up his own title afterwards. This is not like the case of *Jackson v. Spear*, 7 Wend. 401. There is no pretense of mistake or imposition in this case. In that case the defendant, when he made the admission of the plaintiff's title, made no claim himself to the lot; but there were conflicting claimants, and after agreeing to purchase of the plaintiff, he became satisfied that the other claimant had the better title, and purchased of him. This case is not at all like that; the title now set up is much older than the conveyance from Mattison to Bradley; Sheldon Smith did not pretend ignorance of it when the admission was made. and there is no pretense that any imposition was practiced.

But if the defendant was at liberty to impeach the title which he had admitted, with a full knowledge of all his rights, still I think he must fail, as he can not avail himself of any defect in the notice of sale. The day appointed in the notice first published was Sunday. It is asserted that a sale on that day would be void, and therefore it is argued the notice was void. I can not admit the assertion or the consequence. All acts and transactions are lawful, done on the Sabbath, unless prohibited, either by the common law or by statute. All judicial proceedings are prohibited on Sunday by the common law. The act of 1813, for the suppression of immorality, which was in force when the foreclosure took place, prohibits traveling, servile labor, and working, amusements of various kinds, and the exposure for sale of any wares, merchandise, goods, or chattels, with certain exceptions of small meat, milk, and fish, before nine o'clock in the morning. In so far as the transaction of business on the Sabbath is in itself immoral, the permitted sales and purchases are just as immoral as those which are prohibited. Business transactions, therefore, which are void on Sunday, are void not because they are immoral *per se*, but because they are prohibited by law. If the sale of real estate was prohibited on Sunday, it would be unlawful to sell, according to the notice given in the case before us. The proceeding to effect a statute foreclosure of a mortgage is certainly not a judi-



cial proceeding. It is not prohibited by the statute of 1813, nor by any other that I am aware of; and if the act is not prohibited, it is lawful, however improper it may be as a violation of decorum and religious duty.

Again; even if the sale on Sunday would be void, it does not necessarily follow that the notice would be void. It is not necessary that the sale should take place on the day mentioned in the notice; the party instituting the proceedings has a right to postpone the sale; he is expressly authorized so to do by the revised statutes, and it was so held under the former act, in which there was no express provision to that effect: *Jackson v. Clark*, 7 Johns. 225; where it is also said that the six months' notice is not solely for the purpose of giving notoriety as to the time and place of sale, but to enable the mortgagor to raise the money. It had been contended by counsel in that case that if there could be any postponement, it must be for six months; but the court did not assent to it, and gave the answer to the argument as above stated.

On both grounds I am of opinion that a new trial should be granted.

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PERSON ENTERING UNDER ANOTHER'S TITLE IS ESTOPPED to deny that title, as where one enters under a contract of purchase: *Harle v. McCoy*, 23 Am. Dec. 407; *Million v. Riley*, 25 Id. 149. But one entering under such a contract is not estopped, in an action brought by a purchaser under an execution against the vendor, from showing that the vendor's title was merely equitable, and not subject to sale on execution: *Million v. Riley*, *supra*. No estoppel arises from one's silence or admission concerning the title to land, or concerning a disputed boundary, where he is in ignorance or under a mistake as to his own title: *Morrison v. Caldwell*, 17 Id. 84; *Stuart v. Luddington*, 10 Id. 550. In *Kenada v. Gardner*, 3 Barb. 592, the foregoing decision is recognized as an authority for the doctrine that one entering under another's title, either as tenant or under a contract of purchase, can not dispute that title while in possession. It is cited on the same point in *Beardslee v. Beardslee*, 5 Id. 329. But in *Swick v. Sears*, 1 Hill, 19, it was held that where it appeared that the plaintiff stood by and not only saw the defendant purchase from others, but encouraged him to do so, he was not estopped from asserting in a court of law a title then held by himself, and that the defendant must go into equity for relief; and the case was said to be unlike that of *Sayles v. Smith*, though the point of difference is not very clearly explained.

ACTS DONE ON SUNDAY, WHEN VALID AND WHEN NOT.—See the note to *Coleman v. Henderson*, 12 Am. Dec. 290. See, also, *Van Riper v. Van Riper*, 7 Id. 576; *Story v. Elliot*, 18 Id. 423 and note; *Amis v. Kyle*, 24 Id. 463. For the general principle that any act or contract done or made on Sunday is not void, unless prohibited by statute, except it be a judicial proceeding and therefore void by the common law, *Sayles v. Smith* is relied upon as an authority in *Boynton v. Page*, 13 Wend. 430; *Mazson v. Annas*, 1 Denio, 206; *First Baptist Church v. Utica etc. R. R. Co.*, 6 Barb. 319; *Lindenmuller v.*

*People*, 33 Id. 569; S. C., 21 How. Pr. 166; *Batsford v. Every*, 44 Id. 621; *Miller v. Roessler*, 4 E. D. Smith, 235. In *Westgate v. Handlin*, 7 How. Pr. 372, it appeared that a notice of sale, under a power of sale in a mortgage, appointed a day for the sale, which fell on Sunday, and that shortly before the day appointed the sale was postponed. The sale, having been made on the day to which it had been adjourned was held valid, following the principal case.

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## KIP v. NORTON.

[12 WENDELL, 127.]

**DISPUTED BOUNDARY BETWEEN TWO ADJOINING PROPRIETORS** may be settled by express parol agreement, executed immediately and accompanied by possession according thereto.

**LONG ACQUIESCENCE** by one of such proprietors, in a boundary established by the other, is evidence of an agreement.

**ACQUIESCENCE FOR ONLY FOUR OR FIVE YEARS** in a boundary established by mistake as to the true location, is not sufficient evidence of an agreement.

**EJECTMENT.** At the trial at the circuit, it appeared that the plaintiff and defendants respectively had conveyances, dated in July and August, 1827, from the same grantors, for certain adjoining lots in Buffalo, described as being "known and distinguished," on a certain map, as "lot number nine," and "lot number eight," respectively. Both lots were described as being bounded on one side by a certain "cross canal" laid down on the map. The canal, which was completed before the deeds were executed, was by mistake dug in such a way that it diverged from the line laid down on the map. The agent of the grantors, however, being under a mistake as to the location of the canal with respect to the line laid down on the map, on the request of the defendants located lot number nine in such a way that it encroached several feet on lot number eight, as laid down on the map. Subsequently the agent, being requested by the plaintiff to locate lot number eight, and being still under the same mistake, directed him to begin at the line of lot number nine, as previously located, and to measure the required distance along the canal. The grantors were then the owners of the land on the other side of lot number eight. The mistake in the location of the canal and of the two lots was not discovered by any of the parties until 1832, and in the mean time the defendants had built a valuable store-house abutting on the boundary line between their lot and the plaintiff's, as located under the agent's directions, the plaintiff having knowledge of

the erection of such building while it was in progress, and making no objection thereto. The plaintiff had also erected a building encroaching the same distance on lot number seven. Verdict for the plaintiff, subject to the opinion of this court on the facts.

*C. P. Kirkland*, for the plaintiff.

*J. A. Spencer*, for the defendants.

By Court, SAVAGE, C. J. The only question, as it seems to me, is whether the plaintiff has so assented to the location of No. 9, as to be bound by it. Such an assent must be either express or implied. If there is a disputed line between two adjoining proprietors of land, it may be settled between them, by a location made by both, or made by one and acquiesced in by the other for so long a time as to be evidence of an agreement to the line. There can be no doubt that an express parol agreement to settle a disputed or unsettled line is valid if executed immediately, and possession accompanies and follows such agreement. This was expressly adjudged in *Jackson v. Dyling*, 2 Cai. 198. Not that the title to the land passes by the parol agreement, but the party making the agreement is not permitted to bring an action in violation of it; the agreement does not pass the title, but fixes the location where the estate of each is supposed to exist. So, also, where there has been no express agreement, long acquiescence by one in the line assumed by the other is evidence of an agreement. All the cases cited agree in these positions. It is not pretended, in this case, that any express agreement was entered into between the parties. Each located for himself, under the direction of the agent of their common grantors, who acted under a mistake as to the true location. The plaintiff is not bound, therefore, by any express settlement of the line; and the acquiescence being only four or five years, is not sufficient evidence of an agreement to conclude him.

The plaintiff is entitled to judgment.

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SETTLEMENT OF DISPUTED BOUNDARY BY EXPRESS OR IMPLIED AGREEMENT.—See the note to *Smith v. Dudley*, 13 Am. Dec. 224. A boundary established by a parol agreement executed by possession taken and held in accordance therewith, is conclusive on the parties and those claiming under them: *Brown v. Caldwell*, Id. 660; *Sawyer v. Fellows*, 25 Id. 452. Where a boundary is doubtful, an actual occupation for a number of years, by one of the parties, up to what he supposes to be the line, without any objection from the adjoining proprietor, is strong presumptive evidence that such is its true location: *French v. Pearce*, 21 Id. 680. But it is held in *Smith v.*

*Dudley*, 13 Id. 222, that parol evidence of an agreement between adjoining proprietors that their mutual boundary shall thereafter be different from what it has previously been considered to be, is inadmissible in an action of ejectment between the two owners. This, it will be perceived, was an attempt to change the boundary by parol, and not merely to determine its location, and was therefore clearly contrary to the statute of frauds. An award, upon a proper submission, determining the location of a boundary line, is held conclusive in *Davis v. Havard*, 16 Am. Dec. 537.

The principal case is cited in *Crowell v. Maughs*, 2 Gilm. (Ill.) 423, as an authority for the doctrine that a disputed boundary may be settled by a parol agreement, followed by possession in accordance therewith, the legal effect of such an agreement being not to pass the title to any land which either has not previously owned, but to determine the location of the division line of the tracts owned by each. So in *Dibble v. Rogers*, 13 Wend. 540; *Turner v. Baker*, 64 Mo. 218; S. C., 27 Am. Rep. 238, that long acquiescence by one of two adjoining proprietors in a boundary established by the other is evidence of an agreement and is conclusive. But acquiescence for three years is not enough: *Francois v. Maloney*, 56 Ill. 401; nor for eleven years: *Adams v. Rockwell*, 16 Wend. 312, per Senator Maeson, quoting the language of the principal case. Nor will parol assent to a boundary established by an adjoining proprietor, and occupation in accordance with it for a few months, conclude or estop a party from claiming according to the true line, something more being necessary than an agreement and possession according to it for a short time: *Reed v. McCourt*, 41 N. Y. 441, referring to the principal case as an illustration. In *Smith v. McAllister*, 14 Barb. 437, it is laid down that to be evidence of an agreement, the acquiescence must be for a sufficient length of time to bar an entry. In *Baldwin v. Brown*, 16 N. Y. 364, acquiescence in a boundary established by an adjoining proprietor is said to be effectual, not because it is evidence of a prior parol agreement, but because it is in itself proof of the correctness of the location so controlling as to preclude evidence to the contrary; and *Kip v. Norton* is referred to as illustrating the truth of this position.

## BRISTOL v. DANN.

[12 WENDELL, 142.]

PERSON'S DECLARATIONS CAN NOT BE PROVED BY A PARTY WHO CAN CALL him as a witness.

DECLARATIONS OF A PAYEE WHO HAS GUARANTEED THE NOTE are not admissible in favor of the makers in an action by a subsequent holder.

STATUTE PROHIBITING ADVANCES BY ATTORNEYS on notes left with them for collection does not apply to advances made to assist a needy client in supporting his family, long after the suit was commenced, and after one trial has been had.

ASSUMPSIT on a note payable to one Rogers, or order, and signed with the firm name of the defendants, as partners, by one of their number, the day after the partnership was dissolved. Rogers had guaranteed the note. The defendants offered in evidence certain declarations of Rogers to show that he knew

the partnership was dissolved when he took the note, but the circuit judge rejected them unless it was shown that they were made while Rogers held the note. The plaintiff's attorney testified that after the suit was commenced, and since the former trial, he had made certain advances to the plaintiff to support his family, and to prevent his being taken in execution for certain debts. The defendants claimed that this was contrary to the statute, and debarred a recovery by the plaintiff, but the judge ruled otherwise. The defendants excepted to both these rulings, and after a verdict for the plaintiff, moved for a new trial.

*A. Loomis*, for the defendants.

*J. A. Spencer*, for the plaintiff.

By Court, SAVAGE, C. J. Rogers was the payee of the note; had passed it to the plaintiff for a valuable consideration, and had guaranteed the payment of it. He was a competent witness for the defendants, but not for the plaintiff. He was interested in the event of the suit. If the plaintiff succeeded and collected the money, he was discharged from his guaranty. If the defendants succeeded, he was liable upon his guaranty. His interest was against the defendants, and therefore he was a competent witness for them, and the plaintiff could not object to him. The rule seems to be settled, that a party who can call a witness shall not be permitted to prove his declarations. A former owner of real estate, through whom the title has passed, is said to be an exception; his admissions against the title while he was in possession may be shown. That rule the judge at the circuit court applied to this case, by permitting the defendants to give evidence of Rogers' admissions while he owned or possessed the note. This was going farther in favor of the defendants than they had a right to ask. In *Whitaker v. Brown*, 8 Wend. 490, where the suit was brought by the bearer of a promissory note, the admissions of the payee while owner of the note were excluded. Several cases are there cited to sustain that decision. If, therefore, there was any error at the circuit, it was in favor of the defendants, and they can not complain of it.

The second point excepted to is equally untenable. There is no pretense that the advance was made with the intent, and for the purpose of bringing this suit; for the advance was made long after suit brought, and subsequent to a former trial. Nor was it made in consideration of the note having been placed in the hands of the attorney for collection: 2 Rev. Stat. 288, secs.

71, 72; and without such intent, under the present statute, the demand is not affected; nor is the attorney punishable. The testimony shows that the advance was made from motives of humanity and benevolence.

There are other points raised by the defendants' counsel, but as no exception was taken upon the trial, it would not be proper to discuss them. I will only remark, that this case is not the same presented on a former occasion; 8 Wend. 443. Nor does it depend upon the same principles. Although the partnership had been dissolved the day before the note was given, yet notice of the fact had not been given; nor does it appear in this case that Rogers knew it.

New trial denied.

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DECLARATIONS OF THE PAYEE of a note are not competent evidence against a subsequent holder; for the latter has a right to have the payee himself produced as a witness: *Beach v. Wise*, 1 Hill, 613; *Paige v. Cagwin*, 7 Id. 369, both citing *Bristol v. Dann*.

CHAMPERTY AND MAINTENANCE IN TRANSACTIONS BETWEEN ATTORNEY AND CLIENT.—See, on this subject, the note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 320. See also *Rust v. Larue*, 14 Id. 172. In *Hall v. Bartlett*, 9 Barb. 301, it is held, citing the principal case, that where there is no suit, the mere purchase of a chose in action is not, *per se*, within the statute forbidding the purchase of notes, etc., by attorneys, for the purpose of bringing suits upon them. The intent is the vital element in such a case.

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## BARHYDT v. VALK.

[12 WENDELL, 145.]

IN TRESPASS FOR FALSE IMPRISONMENT AGAINST A CONSTABLE for taking the plaintiff's body in execution, when he possessed sufficient property subject to the writ, the burden is on the plaintiff to show that fact, and that he disclosed it to the officer.

UNSIGNED INDORSEMENT BY A JUSTICE, RENEWING AN EXECUTION, is void, and the process being thereby defective on its face, will not protect the officer who executes it.

ERROR from the common pleas in an action for false imprisonment against a constable. The defendant justified under a justice's execution in the ordinary form, commanding him to make the amount out of the defendant's goods, or for want thereof to take his body. The plaintiff proved that he had, at the time, sufficient goods to satisfy the execution. The execution being produced, it appeared that before the arrest it had been renewed by an indorsement in the justice's handwriting, but not signed by him, and that he had entered the renewal in his docket.

The plaintiff's objection that the renewal was void was overruled. On a motion for a nonsuit, the judge held that the plaintiff must prove that the officer had express notice that he possessed sufficient goods, etc., and upon his refusing to produce such proof, he was nonsuited, and brought error.

*J. Brotherson*, for the plaintiff in error.

*A. C. Paige*, for the defendant in error.

By Court, NELSON, J. It is no doubt the duty of the constable to search for property of the defendant in the execution, out of which to collect the debt, before committing the defendant to jail, and we do not say but that there may be so flagrant a departure from duty in this respect as to sustain the action of trespass and false imprisonment, where a committal takes place without such search, and when there is sufficient property to satisfy the execution; but the case should be a very clear and marked one, to induce the court to countenance this remedy. These executions combine the common law writs of *fi. fa.* and *ca. sa.*, and the officer is bound to execute the one or the other within thirty or ninety days, as the case may be, at his peril, if within his power. To prove affirmatively that he had searched for property may oftentimes be impossible, unless he takes with him a witness, which can not be required; and we therefore perceive no objection to the application of the general presumption that the officer had done his duty in the first instance, and to throw the burden, in these cases, upon the defendant, to show that he had property clearly subject to the execution, and that he disclosed the fact to the constable, who notwithstanding refused to take it.

The revised statutes provide, that an execution not satisfied may from time to time be renewed by the justice issuing the same, "by an indorsement thereon to that effect, signed by him, and dated when the same shall be made:" 2 Rev. Stat. 251, sec. 145. Without this provision a new execution must necessarily have been issued, and I do not see how we can consider the old process revived without a substantial compliance with the terms of the statute. The former act, laws of 1824, p. 286, sec. 14, did not prescribe the form of such renewal, and it was decided, 6 Wend. 663, that any memorandum of the justice upon the execution indicating an intention of renewing the same was sufficient, without his signing his name. The present statute prescribes the form, the substantial parts of which can not be dispensed with, and as the process is defective upon the face of

it, it can not protect the officer within any of the cases on this subject: 5 Wend. 175 [*Savacool v. Boughton*, 21 Am. Dec. 181] Judgment reversed.

OFFICIAL DUTY IS PRESUMED TO HAVE BEEN PERFORMED until the contrary appears: See *Terry v. Bleight*, 16 Am. Dec. 101. To the same effect, see *Tutthill v. Wheeler*, 6 Barb. 366, and *Downing v. Rugar*, 21 Wend. 184, citing *Barhydt v. Valk*. It is cited to the same point in *Bank of Troy v. Topping*, 13 Wend. 563, but the principle is held inapplicable to executors and administrators.

UNSIGNED INDORSEMENT RENEWING A JUSTICE'S EXECUTION is void: *Ostrander v. Walter*, 2 Hill, 332, citing *Barhydt v. Valk*; but it is there said that the omission to state the amount due, in such renewal, does not avoid it, the statutory provision on that point being regarded as merely directory.

JUSTIFICATION OF OFFICER UNDER PROCESS.—As to when an act done in execution of process may be justified, and when not, see the note to *Savacool v. Boughton*, 21 Am. Dec. 109; see also *Wilcox v. Smith*, Id. 213; *Watson v. Watson*, 23 Id. 324; *Miller v. Brown*, Id. 693; *McCoy v. Curtice*, 24 Id. 113; *Reynolds v. Moore*, Id. 116, and note; *Baker v. Freeman*, Id. 117; *Coltraine v. McCaine*, Id. 256.

## BLADE v. NOLAND.

[12 WENDELL, 173.]

PROOF OF THE VOLUNTARY DESTRUCTION OF A NOTE BY THE PAYEE, without any explanation of the act, consistent with an honest or justifiable purpose, is insufficient to let in secondary evidence of its contents.

STATUTE REQUIRING A BOND OF INDEMNITY in actions on lost notes applies only to negotiable notes.

COURT WILL NOT PRESUME A LOST NOTE to be negotiable.

PLAINTIFF IS A COMPETENT WITNESS TO PROVE THE LOSS of a note, but not where he has designedly destroyed it.

ERROR from the common pleas to reverse a judgment there rendered, affirming a judgment of a justice's court in favor of the plaintiff in an action on a lost note. It was proved by the plaintiff and by another witness, that the plaintiff burned the note the day after it was given, but there was no explanation of his reason for doing so. Secondary evidence of its contents was then admitted. This was the principal error complained of by the defendant, now plaintiff in error.

*J. G. Watson*, for the plaintiff in error.

*J. Butterfield*, for the defendant in error.

By Court, NELSON, J. I concede the rule insisted on by the counsel for the plaintiff below, to the fullest extent, borne out by the authorities, and they are numerous; and still am of



opinion that the plaintiff did not give such proof of the loss of the note as to justify the secondary proof of its contents, or to entitle him to resort to the original consideration. If there had been satisfactory proof of the loss or destruction of the note, the omission to give a bond of indemnity under the statute, 2 Rev. Stat. 406, secs. 75, 76, would not have interfered with the recovery; for the provision of the statute on this subject is limited to negotiable paper. There is no evidence that the note in question was negotiable, and it seems to be settled that the court will not presume a lost note to be negotiable: 10 Johns. 104; 3 Wend. 344.

The proof is, that the plaintiff deliberately and voluntarily destroyed the note before it fell due, and there is nothing in the case accounting for, or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the plaintiff was bound to give affirmatively, for it would be in violation of all the principles upon which inferior and secondary evidence is tolerated, to allow a party the benefit of it, who has willfully destroyed the higher and better testimony. The danger of this very abuse of a relaxation of the general rule greatly retarded its introduction into the law of evidence, and it was for a long time confined to a few extreme cases, such as burning of houses, robbing, or some unavoidable accident. It was contended by Chancellor Lansing, in the case of *Livingston v. Rogers*, 2 Johns. Cas. 488, after an examination of all the leading cases on the subject, that secondary evidence was not admissible to prove the contents of a paper, where the original had been lost by the negligence or laches of the party or his attorney. He failed to convince the court of errors to adopt his views in a case where the negligence was not so great as to create suspicion of design. Further than this I could not consent to extend the rule. I have examined all the cases decided in this court, where this evidence has been admitted, and in all of them the original deed or writing was lost, or destroyed by time, mistake, or accident, or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design: 2 Johns. Cas. 488; 2 Cai. 363; 10 Johns. 363, 374; 11 Id. 446; 8 Id. 149; 3 Cow. 303; 8 Id. 77; 3 Wend. 344; Peak. Ev. 972, Am. ed.; *Leyfield's case*, 10 Co. 936; 3 T. R. 151; 8 East, 288, 289; Gilb. Ev. 97.

In *Leyfield's case*, Lord Coke gives the obvious reasons why

the deed or instrument in writing should be produced in court: 1. To enable the court to give a right construction to it from the words. 2. To see that there are no material erasures or interlineations. 3. That any condition, limitation, or power of revocation may be seen; for these reasons oyer is required in pleading a deed. But he says, in great and notorious extremities, as by casualty of fire, etc., if it shall appear to the judges that the paper is burnt, it may be proved by witnesses so as not to add affliction to affliction.

The above is in brief the foundation of the rule in these cases of secondary proof of instruments in writing, and it has been much relaxed and extended in modern times from necessity, and to prevent a failure of justice; yet I believe no case is to be found where, if a party has deliberately destroyed the higher evidence, without explanation, showing affirmatively that the act was done with pure motives, and repelling every suspicion of a fraudulent design, that he has had the benefit of it. To extend it to such a case would be to lose sight of all the reasons upon which the rule is founded, and to establish a dangerous precedent. We know of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt; and we will not presume one.

From the necessity and hardship of the case, courts have allowed the party to be a competent witness to prove the loss or destruction of the papers; but it would be an unreasonable indulgence, and a violation of the just maxim, that no one shall take advantage of his own wrong, to permit this testimony, where he has designedly destroyed it.

Judgment reversed.

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ACTIONS ON LOST AND DESTROYED NOTES.—For an extended consideration of this subject, see the note to *Edwards v. McKee*, 13 Am. Dec. 480. As to actions on notes voluntarily cut in two for the purpose of transmission by mail or otherwise, see the note to *Bank of United States v. Sill*, Id. 47. In *Edwards v. McKee*, Id. 474, it is held that no action at law can be sustained on a lost bond or note. But in *Rowley v. Ball*, 15 Id. 266, and *Chaudron v. Hunt*, 20 Id. 60, it is held that if a lost note is not negotiable, or if negotiable, not negotiated, an action at law will lie thereon. So, in *Brent v. Ervin*, 15 Id. 157, it is decided that an action may be maintained on a lost note without tendering the defendant any indemnity, if it appears that the note in the hands of any indorsee would be subject to all equities existing in favor of the maker. Even if a note be negotiable, an action at law will lie if it be shown to have been destroyed, for then no indemnity is necessary: *Rowley v. Ball*, 15 Id. 266. The voluntary destruction of a note by the owner is held, in *Vanauken v. Hornbeck*, 25 Id. 509, to destroy his right of action

thereon. So it is held in *Kennedy v. Crandell*, 3 Lans. 7, and *Meyer v. Huack*, 55 N. Y. 418, on the authority of the principal case, that the fraudulent, criminal, or unlawful destruction of a note or other written evidence of debt by the owner will take away his right of action. So that the voluntary destruction of a note or other paper, unexplained, will not let in secondary evidence of its contents on behalf of the party destroying it: *Bagley v. McNickle*, 9 Cal. 448; *Enders v. Sternbergh*, 33 How. Pr. 470; S. C., 1 Keyes, 289. In the latter case this is referred to as an exception to the general rule as to admitting parol proof of the contents of a paper shown to have been destroyed. In "*Count Joannes*" v. *Bennett*, 5 Allen, 173, it is held, citing the principal case, that even the alleged negligent destruction or loss of an instrument, without any explanation or evidence to rebut the suspicion of a fraudulent design, will not authorize the admission of secondary evidence of its contents. But of course, where a paper is shown to have been "lost or destroyed *bona fide*," secondary evidence is admissible: See the note to *Bank of the United States v. Sill*, 13 Am. Dec. 48. As where a paper had apparently become of no importance, and having been lost or destroyed, the owner made affidavit that he had made diligent search for it: *Oriental Bank v. Haskins*, 3 Mete. 337, citing *Blade v. Noland*.

So where canceled drafts representing advances made by the plaintiffs to the defendant were destroyed by the plaintiffs on being returned from the bank, according to their usual custom and without any fraudulent intent, it was held not to destroy the plaintiffs' right of action for the advances made to the defendant, and that the rule of *Blade v. Noland* did not apply: *Steele v. Lord*, 70 N. Y. 283. In delivering the opinion, Rapallo, J., thus referred to the principal case: "In this case [*Blade v. Noland*], as stated in the opinion of Nelson, J., the proof was that the plaintiff deliberately and voluntarily destroyed the note before it fell due, and there was nothing in the case accounting for or affording any explanation of the act, consistent with an honest or justifiable purpose, and the learned judge concludes by saying that he knows of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt, and will not presume one. The report of the case shows that no explanation whatever of the destruction was given, and that there were circumstances of suspicion attending it. We do not think that the present case falls within the case of *Blade v. Noland*. The drafts in question in this action were not the contracts upon which, in case of dispute, the action should be brought; they had all been paid, and the action was for a balance of account, and these paid drafts were useful only as vouchers to prove the items of the account in case it should be disputed. The evidence shows, that at the time of the destruction of these paid drafts, no such dispute had arisen or was anticipated."

That where a note not negotiable, or if negotiable not negotiated, is accidentally lost or destroyed, an action will lie thereon without tendering indemnity, and that the court will not presume a lost note to be negotiable, are propositions upon which the principal case is cited in *Bristol v. Sniffen*, 1 Daly, 157; *Des Arts v. Leggett*, 5 Duer, 161; S. C., in the court of appeals, 16 N. Y. 586; *Wright v. Wright*, 54 Id. 441. So, that under the old law of evidence, the testimony of a party was necessarily admitted in certain cases to prove the loss or destruction of a paper for the purpose of letting in secondary evidence of its contents, but only for that purpose: *Parsons v. Pierce*, 8 Barb. 663; *Hollenbeck v. Van Valkenburgh*, 5 How. Pr. 235.

## COLLINS v. ALLEN.

[12 WENDELL, 356.]

**MAKER OF A NOTE TRANSFERRED AFTER DUE CAN NOT SET OFF** against it a note against the payee purchased before the transfer, where he was indebted to the payee at the time of such transfer, on other demands, exceeding the amount of the note so purchased.

**AGENT IS PERSONALLY LIABLE ON HIS CONTRACTS**, unless he shows such an authority to contract as will bind his principal.

**ASSUMPSIT** on a note of the defendant, payable to one Williams, or bearer, and transferred by Williams to the plaintiffs, for value, after it was due. At the trial at the circuit the defendant, under a notice of set-off, gave evidence of a note made by Williams to one Tanner, and purchased from Tanner by the defendant before the note in suit was transferred to the plaintiffs. It appeared that at the time of the transfer of the note sued on, and before and afterwards, the defendant was indebted to Williams in a sum exceeding the amount of the Tanner note, for labor performed in drawing stone for the Baptist college at Brockport. The defendant was one of the building committee of the college, but informed Williams, when he employed him to do the work, that the other committeemen were not willing to pay the price he had contracted to pay, but if Williams would go on he should be paid. The other facts appear from the opinion. The judge rejected the set-off, holding that the Tanner note must be applied to the other indebtedness of the defendant to Williams. Verdict for the plaintiffs for the amount of the note sued on. Motion for a new trial.

*C. P. Kirkland*, for the defendant.

*M. T. Reynolds*, for the plaintiff.

By Court, NELSON, J. The verdict in this case was right. The defendant was individually responsible for the demand of Williams, under the contract for drawing stone, and that being to an amount more than sufficient for the purpose, exhausted the note transferred to the defendant by Tanner.

Although the defendant entered into the contract for the drawing of the stone as one of the building committee of the Baptist college, he was individually liable, unless he showed such an authority to contract as would bind his principals: 13 Johns. 307. No such authority was shown. It did not even appear that the body alleged to be his principals had a legal existence, or if they had such existence, that it was competent

to them to appoint an agent, and that they would be bound by his acts. Besides, by the admission of the defendant, it seems that he made the contract with Williams without the assent of his associates, and that they expressly refused to bind their principals. Most clearly, then, the college would not have been responsible to Williams, and of course the defendant is liable.

It was asked by the counsel for the defendant, if Williams, instead of having a note and an account against the defendant, had held two notes, and after having transferred one of them, should transfer the other, against which would the note purchased by the defendant be a set-off, under the provisions of the statute? The answer is, it would be a set-off against the note last transferred. The defendant, in such a case, should not be permitted to insist upon his set-off against the note first transferred, because, when it passed into the hands of a third person, the equities of the maker to set off his demands against the payee would be met and overthrown, by the fact that the assignor still held demands against him to an amount sufficient to exhaust his set-off; and upon the question of who has the better equity, there can be no doubt that the claims of the purchaser of the note for a valuable consideration would be preferred to those of the maker. These considerations would not apply to the case of the second assignee.

New trial denied.

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SET-OFF, WHEN ALLOWABLE AND WHEN NOT.—See the note to *Gregg v. James*, 12 Am. Dec. 152. An assignee of an account takes it subject to the debtor's right to set off a subsisting note held by him against the assignor: *Cary v. Bancroft*, 25 Id. 393. No demand can be set off unless it be a debt existing in favor of the defendant when the action is brought: *Shepherd v. Turner*, 15 Id. 631. As to setting off a partner's debt against a partnership demand, or vice versa, see *Ritchie v. Moore*, 7 Id. 688; *Gregg v. James*, 12 Id. 151; *Lewis v. Cubbertson*, 14 Id. 607. As to setting off against a joint obligation, a separate demand in favor of one of the co-obligors, see *Pitcher v. Patrick*, 12 Id. 54, and *Henderson v. Lewis*, 11 Id. 733. One of several defendants may set off a demand due him individually: *Stewart v. Coulter*, 14 Id. 680. That an agent's debt can not be set off against a claim due the principal, see *Braden v. Louisiana State Ins. Co.*, 20 Id. 277. In general, all money demands for which *indebitatus assumpsit* or debt will lie, may be the subjects of set-off: *Jenkins v. Richardson*, 22 Id. 82. Where a debtor has a set-off equally applicable to two demands against him, he can not elect to which he will apply it, but the court will apply it according to the equity of the case: *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 392; *United States v. Prentice*, 6 Mo. Lean, 67, both citing the principal case.

AGENT PERSONALLY BOUND BY HIS CONTRACTS, WHEN.—The cases in the American Decisions on this point are collected in the note to *Andrews v. Estes*, 26 Am. Dec. 524.

**BEEBEE v. ROBERT.**

[12 WENDELL, 413.]

**WHERE A BROKER OR AGENT PURCHASES GOODS, WITHOUT DISCLOSING HIS PRINCIPAL,** the principal, when discovered, is nevertheless liable for the price, and may also sue on a warranty in the contract.

**SALE BY SAMPLE** is in judgment of law a warranty that the bulk of the commodity corresponds in quality with the sample.

**DRAWING OF FRESH SAMPLES BY A PURCHASER OF PACKED COTTON** to ascertain if they correspond with the first samples, does not make it any the less a sale by sample, and the vendor is liable on his warranty, if the bulk of the cotton does not correspond with the samples.

**STATEMENT OF DAMAGES SUBMITTED WITH A VIEW TO A COMPROMISE** does not preclude a purchaser of goods from recovering his actual damages from a breach of a warranty in the sale, where the compromise is not accepted.

**NEW TRIAL WILL NOT BE GRANTED ON THE GROUND OF SURPRISE,** in such a case, because the plaintiff claims and gets a verdict for additional damages to those specified in such statement.

**ASSUMPSIT** for a breach of warranty on a sale of twenty-five bales of packed cotton by sample. The cotton was purchased for the plaintiffs by one Woolley, a broker, who did not at the time disclose for whom he was acting, and gave his own note for the price. He stated at the time that he was purchasing for other parties. After giving his note, however, he informed the defendant that he was acting for the plaintiffs. The facts concerning the contract of sale sufficiently appear from the opinion. The plaintiffs delivered the cotton to the Jefferson cotton mills to be worked up, they being the chief stockholders in the corporation owning the mills. After some of the cotton was manufactured, it was discovered that much of it was damaged. The plaintiffs had an appraisal made by certain operatives in the mills, and they gave a certificate that the damaged cotton amounted to about fifteen hundred pounds. This certificate, with a statement of the amount which the plaintiffs were willing to accept as damages, to wit, one hundred and eighty-two dollars and fifty-three cents, was sent to the defendant. The defendant did not accept the offer to settle. At the trial, the plaintiffs proved that the actual amount of damaged cotton, as well as the amount of their damages, was considerably greater than that specified in the certificate and statement. It appeared that the defendant sold the cotton on commission. At the close of the plaintiffs' case, the defendant moved for a nonsuit, because the action should have been brought by Woolley or by the Jefferson Cotton Mills Company; because, if

the plaintiffs had sold the cotton to the company, as it did not appear whether they had sold with warranty or not, it did not appear that the plaintiffs had suffered any damage; and because this was not a sale by sample, or with warranty. The motion was overruled, and the defendant excepted. When the testimony was concluded, the defendant further claimed, that in any event the plaintiffs could not recover damages for any quantity of injured cotton in excess of fifteen hundred pounds, the amount specified in the certificate above referred to. The judge, on this point, left it to the jury to determine whether the certificate and statement were submitted by way of compromise or not, and instructed them that unless it were so, the plaintiffs were bound by it; otherwise they could recover whatever actual damages they had proved, though exceeding that specified in the statement; to which the defendant excepted. Verdict for the plaintiffs for five hundred dollars damages. Motion for a new trial, founded on the exceptions above mentioned, and also on the ground of surprise as to the amount claimed, the defendant having been misled by the certificate and statement above mentioned. Certain affidavits on this point were filed by the plaintiffs, the substance of which is stated in the opinion.

*J. A. Spencer*, for the defendant.

*J. H. Bronson*, for the plaintiffs.

By Court, SUTHERLAND, J. The suit was properly brought in the name of the present plaintiffs. Woolley acted as their factor or agent merely, in the purchase of the cotton; he had no interest in the transaction beyond his commissions; he is not responsible to the plaintiffs for the defect in the quality of the cotton; he has suffered no injury, and no action could be sustained in his name against the defendant for the breach of the implied warranty—there was no express contract or agreement with him. If Woolley, the factor, had failed to pay for the cotton, Robert could have recovered its value from the plaintiffs. When goods are bought by a broker or other agent, and he does not disclose his principal at the time, the principal, when discovered, is liable on the contracts which his agent has made for him: 2 Liverm. on Agency, 200; *Waring v. Favenck*, 1 Camp. 85; *Kymer v. Suwercropp*, Id. 109; 4 Taunt. 576, note a; *Pentz v. Stanton*, 10 Wend. 271 [25 Am. Dec. 558].

Where the principal is disclosed at the time of the purchase, it then becomes a question of fact, to be determined from all

the circumstances in the case, whether the vendor relied exclusively upon the credit of the agent or not. If he did, he can not afterwards resort to the principal: 2 Liverm. 200, 201; 15 East, 62; 4 Taunt. 574. If the plaintiffs might have been made responsible to the defendant for the purchase money upon this contract, it would seem to follow that there is sufficient privity of contract between them to enable the plaintiffs to maintain this action against him for the alleged violation of his part of the agreement. The general rule is, that the action should be brought in the name of the party whose legal interest has been affected, against the party who committed the injury: 1 Chit. Pl. 1; *Hammond on Parties to Action*, 3; 1 Bos. & Pul. 101, note c; 3 Id. 149 and note; *Daves v. Peck*, 8 T. R. 330; 10 Johns. 387; *Yates v. Foot*, 12 Id. 1. In *Spencer v. Field*, 10 Wend. 87, and *Sailly v. Cleveland and Hutton*, Id. 156, the question as to the proper parties to an action was discussed at length, and most of the authorities were there referred to. Those cases clearly show that this action is properly brought in the names of the present plaintiffs.

If the cotton was, subsequently to the original purchase by the plaintiffs, sold by them to the Jefferson Cotton Mills, which is not satisfactorily shown, it would in no respect affect their right to maintain this action. There is no evidence whatever as to the terms or conditions of the sale, whether it was with or without warranty, whether at the original, or at a reduced price in consequence of its inferior quality. If the cotton was actually sold to the company, it is to be presumed to have been sold either with warranty or at its fair value. But the evidence upon that point is altogether too vague to affect in any manner the plaintiffs' right to maintain this action.

Was this a sale by sample? If it was, it is not disputed that it amounted in judgment of law to a warranty, on the part of the vendor, that the bulk of the cotton corresponded in quality with the samples exhibited. The law upon this point is too well settled to be questioned: 4 Cow. 440; 6 Id. 354; 9 Wend. 20, and the authorities referred to in those cases. Woolley, the broker who made the purchase for the plaintiffs, states that he called at the defendant's counting-room and examined his samples, told him he had an order from a manufacturer, and wanted good cotton. The samples were in the defendants' counting-room. Witness examined them and made a bargain for twenty-five bales, to be selected from two separate lots, on condition that, upon inspection of the cotton, and on drawing fresh sam-



ples, they, the fresh samples, should be as good as the samples exhibited to him. The witness and the defendant accordingly went and drew samples from the two lots, and the witness then selected twenty-five bales from the whole. The defendant and the witness each drew samples, and the witness made the selection and marked the bags. He selected the twenty-five bales in question, by comparing the samples which were then drawn with the samples shown to him by the defendant at his counting-room. The samples were drawn with a common cotton sampler, about a foot long; they were taken in the usual way, from the ends of the bales. The drawing of these second samples was merely for the purpose of testing the correctness of those first exhibited. Woolley, the factor, had previously agreed to purchase twenty-five bales, if the second samples should prove as good as the first. Subject to that consideration alone, the contract was complete before the second samples were drawn, and the only object in drawing them was to satisfy the agent that the first samples were fairly drawn. It falls directly within the case of *Gallagher and Mason v. Waring*, 9 Wend. 20. It is entirely immaterial whether the samples were drawn by the plaintiffs' broker or by the defendant himself; they were both present, and, it would seem, each drew nearly an equal quantity. In *Gallagher v. Waring*, above referred to, the sale was made by the defendants' broker, the defendants not being present; and the question arose whether he was not the agent of the plaintiffs in drawing the second samples; they having been drawn at their request, and not having been seen by the defendants; and the argument was, that the sale was made upon the faith of the second samples, and not of the first, which had been furnished by the defendants; and that the defendants could not be held responsible in relation to them, as they had never seen or furnished them. But it was satisfactorily answered that, as both samples were alike in quality, the only effect of drawing the second was to show the accuracy of the first, and that it was in fact a sale by the first samples. But in this case, if the sale had been made on the strength of the second samples, as they were seen and exhibited by the defendant himself, it would afford no ground of objection to the plaintiffs' recovery. But in this, as in the case in 9 Wend., both sets of samples were of the same quality.

In the *Oneida Manufacturing Society v. Lawrence*, 4 Cow. 444, the chief justice remarked that every sale of packed cotton must be considered in the nature of a sale by sample. It seems to have

been contended in that case that it was not a sale by sample, because the plaintiffs' agent saw the bags, in which the cotton was packed, before he made the purchase; and that it therefore fell within the general rule, that where the vendee has an opportunity of examining the commodity, the vendor is not responsible for any latent defect, without fraud or express warranty. But from the very nature of this article, and the form in which it is sent to market, no effectual examination can be made without breaking up the bales. This is never done; the trouble and expense of repacking effectually prevent it. Although the plaintiffs' agent in this case saw the bags, and drew samples from them, he had no opportunity of examining the bulk of the commodity; he was compelled still to rely upon the samples. It was therefore a sale by sample, and the evidence clearly shows that the bulk of the cotton was of very inferior quality to the samples exhibited.

The jury have found that the statement of damages, which was made out by the plaintiffs, and sent to the defendant, was made and sent with a view to a compromise, and the judge correctly decided that if it was so made, the plaintiffs were not bound by it, but might recover all the damage which they could show they had sustained. The motion for a new trial must therefore be denied on the bill of exceptions.

As to the application for a new trial, on the ground of surprise: The allegations of the defendant are fully answered and rebutted by the affidavits on the part of the plaintiffs, one of whom states that in April, 1831, about two months before the trial, he told the defendant that they had sustained very serious injury from the bad quality of the cotton; and that if driven to a trial to get their damages, they should get all they could, and that the defendant might rely upon it, they should make out a bad case against him. But independently of this direct information, the circumstances of the case by no means authorized the defendant to believe that the only damage claimed by the plaintiffs was the price of the cotton actually rotten and good for nothing. The plaintiffs were willing to take that, if promptly allowed, to avoid the delay, vexation, and expense of a law suit; but if driven to an action, the defendant ought to have known that they would prove all the damage they could; and that if one thousand five hundred pounds of the cotton was rotten and good for nothing, the quality of the rest must have been more or less affected by it. This ground of the application for a new trial is not sustained.

New trial denied.

WHERE AN AGENT CONTRACTS WITHOUT DISCLOSING HIS PRINCIPAL, the latter may sue on the contract, subject to any set-off or defense which existed against the agent before the principal was disclosed: *Tutt v. Brown*, 15 Am. Dec. 33. So the principal when discovered is bound, though the agent purchases in his own name, unless the vendor elects to treat the agent as his debtor, or unless the principal has settled with the agent, owing to documents furnished by the vendor: *Hyde v. Wolf*, 23 Id. 484. That an undisclosed principal is liable, when discovered, on a contract made by his agent, and that an action may be maintained on such contract in the name of the principal, are positions to which the principal case is cited in *Jones v. Aetna Ins. Co.*, 14 Conn. 506; *Dykens v. Townsend*, 24 N. Y. 61; *McKay v. Draper*, 27 Id. 264; *Union India Rubber Co. v. Tomlinson*, 1 E. D. Smith, 379; *Ferguson v. Hamilton*, 35 Barb. 442; *McMonnies v. Mackay*, 39 Id. 565; *Inglehart v. Thousand Island Hotel*, 7 Hun, 549. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. 381, and *Elkins v. Boston etc. R. R.*, 19 N. H. 342, the case is relied on as authorizing the further position, that either the principal or the agent may sue on such a contract. In *Rose v. United States Telegraph Co.*, 6 Rob. 309; S. C., 3 Abb. Pr., N. S. 412; 34 How. Pr. 312, it is held, citing *Beebe v. Robert*, that either the principal, when discovered, or the agent, may be held liable on such a contract, at the election of the other party. But a vendor selling to an agent, with knowledge that he is an agent, and yet relying exclusively upon his credit, can not afterwards resort to the principal: *Hyde v. Paige*, 9 Barb. 151; *Maryland Coal Co. v. Edwards*, 4 Hun, 434, both citing the principal case. The case is cited also in *Indianapolis etc. Railway Co. v. Tyng*, 63 N. Y. 655, as illustrating the position that parol evidence is admissible to let in a party who does not appear in the contract, but not to discharge a party who does appear.

SALE BY SAMPLE IS TANTAMOUNT TO A WARRANTY that the bulk of the thing sold is of the same quality as the sample: See *Bradford v. Manly*, 7 Am. Dec. 122, and the note thereto, discussing the subject at length. See also *Sands v. Taylor*, 4 Id. 374, and *Boorman v. Jenkins*, *post*. The principal case is cited as an authority on the same point in *Ricks v. Dillahunty*, 8 Port. 140; *Mages v. Billingsley*, 3 Ala. 696; *Coolidge v. Brigham*, 1 Meto. 553; *Hart v. Wright*, 17 Wend. 271; S. C., 18 Id. 456; *Waring v. Mason*, 18 Id. 445; *Hargous v. Stone*, 5 N. Y. 87; *Beirne v. Dord*, Id. 99.

## AYMAR v. SHELDON.

[12 WENDELL, 439.]

INDORSEMENT IS EQUIVALENT TO THE DRAWING of a new bill.

INDORSEMENT IS GOVERNED BY THE LAW OF THE COUNTRY where it is made, with respect to the rights and liabilities growing out of it, though the bill was drawn and made payable in a foreign country.

WHERE A BILL, DRAWN AND PAYABLE IN COUNTRIES WHERE THE FRENCH LAW PREVAILS, is indorsed in New York, in order to charge the indorser, presentment for payment and protest must be made according to the French law, but notice must be given according to the New York law.

AFTER PROTEST FOR NON-ACCEPTANCE IN SUCH A CASE, the presentment for payment required by the French law is unnecessary to charge the indorser in New York.

SPECIAL INDORSEMENT is necessary in such a case if the indorser desires to protect himself by requiring the holder to take the steps necessary under the French law to charge the drawer.

ERROR from the superior court of New York city, in an action brought by the indorseees against the payees and indorsers of a bill drawn in Martinique, and made payable at Bordeaux, in France, to the order of the defendants in this action, twenty-four days after sight. The declaration alleged that the bill was indorsed to the plaintiffs in New York, where both the plaintiffs and defendants resided, and that the bill was presented to the drawees at Bordeaux for acceptance, according to the custom of merchants, acceptance refused, and due protest made for non-acceptance, and due notice given to the defendants. The defendants, in addition to other pleas, pleaded, in substance, that the bill was drawn and made payable in countries where the French law prevailed, and that by that law it was provided, among other things, that after protest for non-acceptance, the holder must nevertheless present the bill to the drawee for payment when due, and protest the same for non-payment, and that though when this action was commenced twenty-four days had elapsed from the date of the alleged protest for non-acceptance, yet no protest for non-payment had been made. Other provisions of the French law relating to bills of exchange, as set out in the plea, are stated in the opinion. This plea was adjudged bad on demurrer, and after a verdict against the defendants on the issues of fact raised by the other pleas, they brought the case here by writ of error.

*D. Lord, jun.*, for the plaintiffs in error.

*D. D. Field and R. Sedgwick*, for the defendants in error.

By Court, NELSON, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers, upon default of the drawees to accept, must be determined by the French law, or the law of this state? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The

persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorseees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled or better understood in commercial law than that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being in almost every respect considered as a new drawer: Chit. on Bills, 142; 3 East, 482; 2 Burr. 674, 675; 1 Stra. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*: 6 Cranch, 21; 2 Kent Com. 460; 4 Johns. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In *Hicks v. Brown*, 12 Johns. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that state, of course from the bill in question. He pleaded his discharge here, and the court say, "it seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed." The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another state, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of *Potter v. Brown*, 5 East, 124, contains a similar principle. See also 3 Mass. 81; *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259]; 1 Cow. 107; 6 Cranch, 221; 4 Cow. 512, note.

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this state, and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the indorser; for in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the holder may have immediate recourse against the indorser for the default of the drawee in this respect: 3 Johns. 202; Chit. on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation, and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition: Chit. on Bills, 93, 217, 266; Bayl. 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was, that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this state. But this can not be, unless the indorsement is deemed an adoption of the original contract of

the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the indorsement is equivalent to a new bill, drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We can not break in upon the settled principles of our commercial law, to accommodate them to those of France, or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps necessary according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

Judgment affirmed.

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LAW OF THE PLACE WHERE A CONTRACT IS MADE determines its construction, unless it is made with a view to performance in another country: *Warder v. Arell*, 1 Am. Dec. 488; *Smith v. Smith*, 3 Id. 410; *De Sobry v. De Laistre*, Id. 536; *Greenwood v. Curtis*, 4 Id. 145; *Scoville v. Canfield*, 7 Id. 467; *Smith v. Mead*, 8 Id. 183; *Touro v. Cassin*, 9 Id. 680; *Bradshaw v. Newman*, 12 Id. 149 and note; *Lynch v. Postlethwaite*, Id. 495 and note; *Miles v. Oden*, 19 Id. 177; *Malpica v. McKown*, 20 Id. 279; *Arayo v. Currell*, Id. 286 and note. But if it appears from the contract that it was intended to be executed in another state or country, the law of such state or country must govern: *Smith v. Smith*, 3 Id. 410; *Touro v. Cassin*, 9 Id. 680; *Malpica v. McKown*, 20 Id. 279; *Arayo v. Currell*, Id. 286; but see the note to the

latter case. That the contract of indorsement is a new contract, and is governed, as to the rights and liabilities growing out of it, by the law of the place where it is made, although the bill or note upon which it is placed is made or payable elsewhere, is held, citing the principal case, in *Hunt v. Standart*, 15 Ind. 35; *Short v. Trabue*, 4 Metc. (Ky.) 304; *Everett v. Vendryes*, 19 N. Y. 438; *Artisans' Bank v. Park Bank*, 41 Barb. 602; *Case v. Hefner*, 10 Ohio, 184; *Poage v. State*, 3 Ohio St. 233; *Conahan v. Smith*, 2 Disney (Ohio), 11; *Musson v. Lake*, 4 How. (U. S.) 262; *Scudder v. Union National Bank*, 91 U. S. (1 Otto) 412. The case is cited to the same point in the footnote to *Holbrook v. Vibbard*, 2 Scam. 467. In *Bank of Commerce v. Rutland etc. R. R. Co.*, 10 How. Pr. 8, it is said that it is a general principle of the law of contracts that the law of the place where a contract is to be performed must govern, where it is different from the law of the place where the contract was made, but that there is some contrariety of opinion with respect to the contract of indorsement, referring to the principal case and others.

In *Lee v. Selleck*, 32 Barb. 525; S. C., 20 How. Pr. 278, the principal case was cited to the point, that all contracts, including the contract of indorsement, are governed, and the rights of the parties determined, by the law of the place where performance was contemplated, though the contract was made in a different place. In that case, it appeared that one bought goods in New York, and agreed to give his note therefor, with the indorsement of a certain citizen of Illinois, and accordingly made and signed a note payable to the latter, at a bank in Illinois, and transmitted it to him, and he indorsed it and forwarded it to the vendors in New York, and it was held that the note was to be governed, as to its construction and the rights and liabilities growing out of it, by the law of Illinois, while the indorsement must be governed by the law of New York. But in *Artisans' Bank v. Park Bank*, 41 Barb. 602, Sutherland, J., who delivered the opinion in *Lee v. Selleck*, thus commented on that case: "The decision in *Lee v. Selleck*, 32 Barb. 522, was probably right, because, probably on the facts found, the indorsement in that case was properly considered as made in New York; but so far as anything was said in the opinion in that case, to the effect that if the indorsement was made in Illinois, it was a contract, in default of payment by the maker, to pay to the holder or indorsee in New York, the opinion is erroneous. The contract of indorsement is undoubtedly a contract to pay where the indorsement is made. What was said in any way inconsistent with this, in *Lee v. Selleck*, was said inadvertently, or at least without sufficient attention to the cases, and perhaps to principle. I say this with less hesitation, because I wrote the opinion in that case." In *Producers' Bank v. Farnum*, 5 Allen, 13, it is held, citing the principal case, that the promise of an indorser is unrestricted as to place of payment.

## STILES v. STEWART.

[12 WENDELL, 473.]

COURT TAKES JUDICIAL NOTICE OF STATUTES CONFERRING JURISDICTION ON JUSTICES OF THE PEACE IN CERTAIN ACTIONS.

AVERTMENT OF JURISDICTION IN SUING ON A JUSTICE'S JUDGMENT recovered in this state, or of the steps by which he acquired jurisdiction, is unnecessary, where the amount, date, and place of the recovery, and the justice's name and office, are alleged.



DEBT on a justice's judgment, the declaration averring in substance that on December 14, 1819, in a certain justice's court of New York, held at Salem, in Washington county, before one David Sill, one of the justices of the peace, etc., the plaintiff, by the consideration and judgment of said court, recovered against the defendant the sum of sixty-eight dollars and eighty-nine cents, damages for the non-performance of certain promises, and his costs, whereof the defendant was convicted, as would more fully appear by the minutes and proceedings before the said justice; with proper allegations that such judgment had not been paid or satisfied. After a verdict for the plaintiff, the defendant moved to arrest the judgment, because the declaration did not aver that the justice had jurisdiction, or set forth the necessary steps taken to acquire jurisdiction.

*W. Woods*, for the defendant.

*C. P. Kirkland*, for the plaintiff.

By Court, NELSON, J. The rule laid down by the chief justice, in *Cleveland v. Rogers*, 6 Wend. 438, so far as the judgments of the justices' courts of this state are concerned, must be considered as confined to the case of an avowry or other pleading subsequent to the declaration, there being various instances in which greater certainty is necessary in a plea than in a declaration, and more certainty being required in a replication than in a declaration, though certainty to a common intent is in general sufficient: 1 Chit. Pl. 514, 624. See also 1 Johns. 384, and 10 Id. 372, 428.

The acts of the legislature of this state, conferring civil jurisdiction upon justices of the peace and authorizing them to take cognizance of certain actions, is a public act, of which the court is bound to take judicial notice. Looking into the declaration in this case, with reference to these acts, it can not but be perceived that the justice had jurisdiction of the case, and was competent to render the judgment sought to be enforced. By the act of 1818 he had authority to render judgments upon confession, to the amount of two hundred and fifty dollars. In the case of a declaration on a foreign judgment of a subordinate tribunal of limited jurisdiction, no doubt the authority under which the judgment was rendered should be set forth, as in that way alone can this court be advised of the jurisdiction of the court rendering the judgment: 7 Wend. 436. A declaration substantially like the one under consideration was adjudged good in *Smith v. Mumford*, 9 Cow. 26.

Motion in arrest denied.

**JUDGMENTS OF JUSTICES AND OTHER INFERIOR OFFICERS AND COURTS, HOW PLEADED.**—In pleading the judgments of superior courts, or courts of general jurisdiction, it is well settled that jurisdictional facts need not be averred, the presumption being in favor of the jurisdiction without any such averment: Freeman on Judgments, sec. 452. But in the absence of any statute on the subject, it is clear from the authorities that the same rule does not apply to justices' judgments and to the determinations of other inferior tribunals of special jurisdiction. It is proper to remark in passing, that although the office of justice of the peace is one of great antiquity, and well known to the common law, yet the civil jurisdiction now appertaining to it in the United States is derived entirely from statutory enactments; for at the common law the justice was merely a conservator of the peace: *Willey v. Strickland*, 8 Ind. 453; *Toledo etc. Railway Co. v. McNulty*, 34 Id. 531. The justice's court, therefore, stands on the same footing in this respect as any other special, statutory tribunal. No intendment is to be indulged in favor of the judgments of such tribunals, with respect to the jurisdiction to pronounce them; but the facts upon which the exercise of the jurisdiction depends ought to be set out as in the case of any other authority or power conferred by statute.

**ANCIENT RULE AS TO PLEADING JUDGMENTS OF INFERIOR COURTS.**—In the older authorities, it was laid down that not only the jurisdictional facts, but all the proceedings prior to the rendition of judgment, must be set out in pleading a decision or determination of any tribunal of special jurisdiction: *Dennis v. Rowls*, 2 Lutw. 918; *Makareth v. Pollard*, 1 Lord Raym. 80. Thus in *Pinager v. Gale*, 2 Vent. 100, the defendant undertook to justify an alleged trespass in the taking of the plaintiff's goods under a judgment of the county court, and pleaded "that J. S. levied plaint in the county court in a plea of debt of thirty-nine shillings and eleven pence against the now plaintiff and *superinde taliter processum fuit*, that he recovered the said debt," etc. On demurrer it was adjudged for the plaintiff, because, among other things, "when a judgment is pleaded in an inferior court, especially in a court not of record, the proceedings should be set forth at large, and not to say *taliter processum fuit*," and because it was not shown that the debt arose within the jurisdiction. It is obvious, however, that where jurisdiction exists as to the subject-matter and the person, the same presumption ought to be indulged in favor of the regularity of its exercise, whether the tribunal be one of limited or of general jurisdiction. Hence, there is no greater reason apparent for setting out the proceedings at large in the one case than in the other.

**ANCIENT RULE MODIFIED SO AS TO ALLOW CONCISE STATEMENT.**—Notwithstanding the ancient decisions to the contrary, to which we have already referred, it was established at an early day, in accordance with the obvious reason of the case, that the proceedings need not be set out in full in pleading the judgment of an inferior court, but that it was admissible, after proper allegations of the jurisdictional facts, to summarize the steps before judgment, under a general averment of "*taliter processum fuit*," concluding with a statement of the recovery of judgment: Freeman on Judgments, sec. 454; 1 Chit. Pl. 385; *Makareth v. Pollard*, 1 Id. Raym. 80; *Rowland v. Veale*, 1 Cowp. 18; *Doe v. Parmiter*, 2 Lev. 81; *Eligginson v. Martin*, 2 Mod. 195; *Cornell v. Barnes*, 7 Hill, 37, note; *Barnes v. Harris*, 4 N.Y. 375. Referring to the English cases on this subject, Mr. Sergeant Williams, the learned annotator of Saunders' reports, says, in his note (2) to *Pitt v. Knight*, 1 Saund. 92: "In pleading the judgments, even of inferior courts, whether of record

or not, it is now held not to be necessary to set out the cause of action, or that the defendant became indebted within the jurisdiction of the court; but it is sufficient to say, that at a certain court, etc., held at, etc., A. B. levied his certain plaint against C. D., in a certain plea of trespass on the case or debt, etc. (as the case may be), for a cause of action arising within the jurisdiction of the court, and thereupon such proceedings were had: that afterwards, etc., it was considered by the said court that the said A. B. should recover against the said," etc.

**JURISDICTIONAL FACTS MUST BE AVERRED.**—Although, as above stated, the proceedings need not be set out in full in pleading the judgment of an inferior court, it is still necessary, as a general rule, in the absence of any statute dispensing with the requirement, that the facts which confer jurisdiction over the subject-matter and the person, should be alleged: *Freeman on Judgments*, sec. 454; 1 Chit. Pl. 385; *Sollers v. Lawrence*, Willes, 413; *Read v. Pope*, 1 Crompt. M. & R. 301; *Willey v. Strickland*, 8 Ind. 453; *Draggoot v. Graham*, 9 Id. 212; *Dakin v. Hudson*, 6 Cow. 221; *Cleveland v. Rogers*, 6 Wend. 438; *Lawton v. Erwin*, 9 Id. 233; *Cornell v. Barnes*, 7 Hill, 35 and note; *People v. Koeber*, Id. 39; *Barnes v. Harris*, 3 Barb. 603; *Turner v. Roby*, 3 N.Y. 193; *Bridge v. Ford*, 4 Mass. 649. A general averment of jurisdiction will not do; the facts upon which jurisdiction depends must be set out: *Cleveland v. Rogers*, 6 Wend. 438; *Sheldon v. Hopkins*, 7 Id. 435; *Lawton v. Erwin*, 9 Id. 233; *Nicholl v. Mason*, 21 Id. 339; *Barnes v. Harris*, 3 Barb. 603. In the latter case, Morehouse, J., after stating that it is not necessary to set out the proceedings at large, but that they may be included under a general averment of *taliter processum fuit*, says: "Under this general rule another principle of pleading must be kept in view, that facts are to be stated for the information of the court, not arguments, or inferences, or matters of law. Facts, then, must be shown, to give jurisdiction, not a mere averment of jurisdiction; and it must be complete, that is, the court must be shown to have had jurisdiction of the subject-matter and of the persons affected by the proceeding or judgment. The case of *Smith v. Mumford*, 9 Cow. 26, furnishes, apparently, an approved precedent of a declaration in debt on a judgment in a justice's court, short of this in not showing jurisdiction of the person; and so, also, does *Stiles v. Stewart*, 12 Wend. 473. The former case was brought before the court upon demurrer to the evidence, and the latter in arrest of judgment. The court do not, however, in either case, advert to the circumstance as affecting the rule. Upon established principles they were good after verdict, though bad before. The case of *Cleveland v. Rogers*, 6 Id. 438, lays down what I esteem the true rule on this subject. It is referred to in *Stiles v. Stewart*, 12 Id. 473, with the remark that it must be considered as confined to a case of an avowry or other pleading subsequent to the declaration, where greater certainty was required. *Lawton v. Erwin*, 9 Id. 233, confirming the rule in 6 Wend., was not referred to. In *Cornell v. Barnes*, 7 Hill, 35, the rule as above laid down was reasserted." The decision in this case was affirmed in *Barnes v. Harris*, 4 N.Y. 375.

It must appear from the pleading that the cause of action was within the jurisdiction of the court: 1 Chit. Pl. 385; *Read v. Pope*, 1 Crompt. M. & R. 301. But, as was held in the principal case, the court will take judicial notice of a public statute conferring jurisdiction upon inferior tribunals, and if the facts alleged as to the amount and nature of the cause of action are such as to show that it was within the jurisdiction of the tribunal pronouncing the judgment, no direct allegation to that effect is necessary: *Masteron v. Matthews*, 60 Ala. 260. As to jurisdiction over the party, it must be alleged

either that process was duly sued out, and served upon him, or that he appeared in the action: *Cornell v. Barnes*, 7 Hill, 35; *Nicholl v. Mason*, 21 Wend. 339. "The allegations showing jurisdiction of the person," says Mr. Hill, in his note to *Cornell v. Barnes*, 7 Hill, 39, "will of course vary according to the mode of proceeding prescribed for and adopted by the inferior court; and it is scarcely necessary to mention that the precedents to be found in the English books on pleading are not to be too closely followed in this respect. In setting forth the judgment of a justice of the peace, the pleader should pursue the course indicated by the case reported in the text; that is, begin by alleging the issuing and service of the summons or other process by which the suit was commenced, and then pass to the rendition of the judgment by a *taliter processum fuit*, etc.: See *Hoose v. Sherrill*, 16 Wend. 33; *Cleveland v. Rogers*, 6 Id. 438. If jurisdiction in the case was acquired independently of the process, as by the party appearing and joining issue upon the merits, the pleading should state the matter accordingly."

A leading case on this subject in New York, prior to the adoption of the code, was *Turner v. Roby*, 3 N. Y. 193. In that case the question arose on a plea of a former adjudication in a justice's court interposed in an action of assumpsit. Bronson, J., delivering the opinion, said: "In pleading the judgments of inferior courts of special and limited jurisdiction—and such are our justices' courts—it is necessary to show that the court not only had jurisdiction of the subject-matter in controversy, but that it also acquired jurisdiction over the person of the defendant.

"The only cases in this state which seem to militate against this rule are *Smith v. Mumford*, 9 Cow. 26, and *Stiles v. Stewart*, 12 Wend. 473; but both of those cases came before the court after verdict. And besides, in both cases, the attention of the court was confined to jurisdiction of the subject, and no notice whatever was taken of the question of jurisdiction over the party. If the defect in pleading was not cured by the verdict, as I am inclined to think it was, still the most that can be said of either of those cases is, that the court overlooked a question which should have been considered; and not that the point was decided one way or the other. It has sometimes been supposed that *Stiles v. Stewart* makes a distinction between setting up a judgment in a declaration, and in a plea; and that in the former case, jurisdiction need not be shown, though it must in the latter. That would answer the plaintiff's purpose in this case, for the question arises on a plea. But there is nothing in the distinction. With a single exception which will be noticed hereafter, whenever the judgment of an inferior court of special and limited jurisdiction is pleaded, whether in a declaration or in any other pleading, it is necessary to show that the court had authority, both as to subject and person, to render the judgment. The general rule is so fully settled, and of such every-day application, that I need not cite books to prove it. It was formerly held necessary to set out the proceedings at large; but in modern times, it is enough to state the facts which show jurisdiction, and then say, *taliter processum fuit*, the judgment was rendered.

"The plea alleges that the plaintiff 'impleaded' Roby. But that is no more than saying he sued or prosecuted him by course of law, or due course of law: Tom. L. D. and Bouv. L. D., Implead; neither of which is sufficient. It is not enough to allege in general terms that the court had jurisdiction; but the facts on which jurisdiction depends must be stated. I will only refer to such cases as happen to lie before me: *Cleveland v. Rogers*, 6 Wend. 438; *Sackett v. Andross*, 5 Hill, 327; *Van Etten v. Hurst*, 6 Id. 311; *People v. Koeter*, 7 Id. 39; *Whitney v. Shufelt*, 1 Denio, 592. In pleading a judg-

ment in *Patrick v. Johnson*, 3 Lev. 403, the allegation was, that the defendant in that action was indebted to the plaintiff within the jurisdiction of the borough court, which was a court of record, and for the recovery of the debt the plaintiff 'impleaded' the defendant in the same court, and found pledges to prosecute his suit, and thereupon *taliter processum fuit*, etc. This was held tantamount to saying, he levied his plaint, which was the proper allegation in that case. But the judgment was in a court of record where jurisdiction was acquired by levying a plaint. Our justices' courts are not courts of record; and jurisdiction over the person of the defendant is not acquired by levying a plaint, but by the issue and service of process, or by voluntary appearance: *Cornell v. Barnes*, 7 Hill, 35 and note (e), 39. The plea neither states that Roby was served with process, nor that he appeared in the former action; and is bad for that reason." The learned judge then proceeded to show that the only exception to the general rule on this subject was where, in an action in an inferior court, on a nonsuit or otherwise, judgment was rendered in favor of the defendant for costs; and the defendant afterwards sued on that judgment for the costs so adjudged. A case of this kind was *Murray v. Wilson*, 1 Wils. 316. In that case it was held that a declaration on a judgment of nonsuit in an inferior court need not show that a plaint was levied for a cause of action arising within the jurisdiction of the court, for, as the court there said, the plaintiff's "process may be illegal from beginning to end," and yet the defendant nevertheless entitled to his costs.

NO DISTINCTION BETWEEN DECLARATION AND OTHER PLEADING IN THIS RESPECT.—There seems to be, as Mr. Justice Bronson says in his opinion in *Turner v. Roby*, above quoted from, "nothing in the distinction" referred to in the principal case, between the method of pleading a judgment of an inferior court in a declaration, and that to be adopted in setting it up as a defense to an action. Judge Bronson, indeed, apparently admitted the existence of such a distinction in *Nicholl v. Mason*, 21 Wend. 339. In that case, the question arose upon a plea. After stating the general rule to be, that in pleading the judgments and proceedings of inferior courts, the facts giving jurisdiction over the subject-matter and the person of the party must be averred, Judge Bronson said: "A declaration on a justice's judgment has, in modern times, been excepted from the operation of this rule: *Smith v. Mumford*, 9 Cow. 26; *Stiles v. Stewart*, 12 Wend. 473." There is no solid reason for a different rule for pleading the same matter as a cause of action, from that which is proper where it is relied upon as a defense; and, as Mr. Hill says, in his note to *Cornell v. Barnes*, 7 Hill, 35, the authorities generally do not prescribe a different rule for the two classes of cases. It matters not, therefore, in what form of action, or in what stage of the proceedings, it becomes necessary for a party to plead a judgment of an inferior court as a foundation for his right. In any case he must, in the absence of a statute to the contrary, set out the facts conferring jurisdiction to pronounce the judgment. It is so, in declaring on such a judgment: *Sollers v. Lawrence*, Willes, 413; *Read v. Pope*, 1 Crompt. M. & R. 301; *Barnes v. Harris*, 3 Barb. 603; S. C., 4 N. Y. 375. So in an action against a constable and his sureties, for neglect to levy and return an execution on such judgment: *Lawton v. Erwin*, 9 Wend. 233; *Cornell v. Barnes*, 7 Hill, 35. So in an action of debt against an officer for suffering an escape of a party taken upon such an execution: *Dakin v. Hudson*, 6 Cow. 221. So where such a judgment is pleaded as a defense: *Turner v. Roby*, 3 N. Y. 193; *Doe v. Parmiter*, 2 Lev. 81. The same rule applies in an action on a recognizance taken by a justice: *People v. Koeber*, 7 Hill, 39; *Bridge v. Ford*, 4 Mass. 649.

WHERE THE OBJECTION IS MADE AFTER VERDICT, as it was in the principal case, it seems that the want of allegations of jurisdictional facts will be deemed cured. Thus, in *Bull v. Steward*, 1 Wils. 255, which was an action against an officer for an escape of a party arrested under the process of an inferior court, it was held, after verdict, that it would be presumed that everything necessary to be proved to sustain the verdict was proved upon the trial, and that the cause of action was within the jurisdiction of the court pronouncing the judgment, unless the contrary appeared upon the record. So, in case for the rescue of a debtor arrested on meane process from an inferior court, it was held, after verdict, not to be a sufficient ground for arresting the judgment, that the declaration did not allege that the cause of action arose within the jurisdiction of the inferior court, and that the party did not appear at the return of the writ: *Bentley v. Donnelly*, 8 T. R. 127. In *Groff v. Griswold*, 1 Denio, 432, it was held, citing the principal case, that in an action in a justice's court, a declaration stating that the plaintiff claims to recover on a former judgment of a justice's court, identifying it, was sufficient, if the defendant did not object by demurrer.

RULE CHANGED BY STATUTE.—By section 161 of the New York Code, 1 Bliss An. N. Y. Code, p. 398, sec. 532, it is provided that, "in pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." Similar provisions have been adopted in most of the states and territories: *Gantt's Arkansas Digest* (1874), sec. 4603; *Comp. Laws of Arizona* (1877), sec. 2495, c. 48, sec. 59; *California Code of Civ. Proc.*, sec. 456; *King's Laws and Rules of Practice in Colorado*, c. 4, tit. 4, sec. 65; *Dakota Code of Civ. Proc.*, sec. 130 (*Rev. Codes of 1877*, p. 533); *Florida Code of Civ. Proc.*, sec. 111 (*Bush's Digest*, 488); *Rev. Laws of Idaho* (1874 and 1875), sec. 59, p. 91; 2 *Miller's Annotated Rev. Code of Iowa*, p. 684, sec. 2714; 2 *Davis Rev. Stat. of Indiana*, p. 76, sec. 83; *Kansas Code of Civ. Proc.*, sec. 121 (*Dassler's Comp. Laws*, 617); *Burnes v. Simpson*, 9 *Kans.* 658, 663; *Bullitt's Codes of Kentucky* (1876), p. 29, c. 7, tit. 7, sec. 122 of the civil practice act; 2 *Comp. Laws of Michigan* (1871), p. 1580, c. 178, sec. 65; *Statutes of Minnesota* (1878), p. 722, sec. 108; *Rev. Code of Mississippi*, p. 187, sec. 586; 2 *Wagner's Statutes of Missouri* (1870), p. 1020, sec. 42; *Montana Civ. Prac. Act*, sec. 67 (*Codified Statutes of Montana of 1871 and 1872*, p. 40); *Gen. Stat. of Nebraska* (1873), p. 544, sec. 127; 2 *Comp. Laws of Nevada*, p. 298, c. 52, tit. 4, sec. 59; *Tourgee's North Carolina Code*, p. 109, sec. 121; *Battle's Revisal*, p. 170, sec. 121; 2 *Rev. Stat. of Ohio* (1880), sec. 5090; *Gen. Laws of Oregon* (compilation of 1872), p. 123, sec. 85; *Rev. Stat. of South Carolina* (1869), p. 609, sec. 184; *Comp. Laws of Utah* (1876), p. 415, sec. 59; *Gen. Laws of Washington Territory* (1869-1871), p. 24, sec. 94. Under these statutory provisions, the allegation that a judgment of an inferior court was "duly given or made" is equivalent to, and is a substitute for the averments of jurisdictional facts required at common law, and dispenses with the necessity for any such averments: *Keys v. Grannis*, 3 *Nev.* 548; *Willey v. Strickland*, 8 *Ind.* 453; *Crake v. Crake*, 18 *Id.* 156; *Hanscom v. Tower*, 17 *Cal.* 518; *Beans v. Emanuelli*, 36 *Id.* 117; *Wheeler v. Dakin*, 12 *How. Pr.* 537. But if there is no allegation that the judgment was "duly given or made," and no equivalent allegation, then the facts necessary to confer jurisdiction must be averred as at common law: *Crake v. Crake*, 18 *Ind.* 156; *Himmelman v. Danos*, 35 *Cal.* 441.

The word "duly" is most essential, and in general it is safest, though, perhaps, not indispensable to follow the language of the statute. An allegation that the plaintiffs commenced an action in a justice's court before a certain person, "who was a justice of the peace, and had full authority and jurisdiction over both the person of the defendant and the subject-matter of the action, to try the same, and that such proceedings were thereupon had that, etc., judgment was entered in said action by said justice in favor of the plaintiffs," etc., is not sufficient: *Hunt v. Dutcher*, 13 How. Pr. 538. The officer making the adjudication must be designated. Therefore, a plea that certain premises were "duly sold," for the non-payment of a tax "duly imposed," without stating by whom it was imposed, is insufficient: *Carter v. Koezley*, 14 Abb. Pr. 147; S. C., 9 Bosw. 583. For an illustration of averments which have been held substantially equivalent to the allegation provided for by statute, where a judgment of an inferior court is pleaded in justification in an action for causing the plaintiff to be arrested and imprisoned, see *Willis v. Havemeyer*, 5 Duer, 447.

**PLEADING JUSTICE'S JUDGMENT OF SISTER STATE.**—In the absence of any statute, of course, an action can not be maintained on a judgment of an inferior tribunal of another state without averring and showing the jurisdiction of the court to pronounce the judgment. As a court will not take judicial notice of the laws of another state, it is necessary, in pleading a justice's judgment rendered in a sister state, to plead the statute which gave the justice jurisdiction: *Sheldon v. Hopkins*, 7 Wend. 435; *Thomas v. Robinson*, 3 Id. 267. There seems to be some question also whether the necessity of pleading jurisdictional facts, where such a judgment is relied on, is dispensed with by the statutes above referred to, providing that the judgment of an inferior court may be pleaded to have been "duly given or made." In *Hollister v. Hollister*, 10 How. Pr. 539, it was said, though the statement was rather *obiter dictum*, that section 161 of the New York code did not apply to foreign judgments, and therefore did not change the common law rule as to pleading judgments of inferior courts in a sister state. In *Karns v. Kunkle*, 2 Minn. 313, it was held also that a similar provision in the Minnesota statutes did not apply to judgments of another state. In *Halstead v. Black*, 17 Abb. Pr. 227, it was directly decided, on the other hand, that under the New York code, a judgment of another state could be pleaded as having been "duly given or made." That case, however, was one involving a judgment of a superior court.

But if the statute applies at all to foreign judgments, it must apply to those of courts of inferior jurisdiction. In Indiana it has been expressly determined that it does so apply: *Willey v. Strickland*, 8 Ind. 453; *Crake v. Crake*, 18 Id. 156; *Toledo etc. Railway Co. v. McNulty*, 34 Id. 531. In *Crake v. Crake*, 18 Id. 156, Perkins, J., says: "It is doubted in other states where code-pleading is adopted, whether the substitute for the common law averments can be used in the suit upon the transcript of a judgment from another state: Abb. Pl. (N. Y.) 231, note *w*; Swan's Pl. & Pr. (1861), 211. But it has been allowed to be so used in this state, and we are not disposed to depart from the practice we have adopted on this point. In suing, then, in this state, upon a judgment of a justice of the peace, the complaint must either aver the facts showing jurisdiction, or allege, as a substitute, 'that the judgment was duly given:' Swan, *supra*. The form copied in *Dragyoo v. Graham*, 9 Ind. 212, is defective in this particular." It seems to us that these latter cases hold the better doctrine. There is no apparent reason why the same rule of pleading should not apply to causes of action of

the same kind, although they may have arisen in different states, unless such a construction of the statute is forbidden by its express terms, or by necessary implication, which does not seem to be the case.

PUBLIC STATUTES JUDICIALLY NOTICED in the same state: See the note to *State v. Twitty*, 11 Am. Dec. 780; *People v. Herkimer*, 15 Id. 379. But not so the laws of a sister state: *Holmes v. Broughton*, 25 Id. 536, and citations in the note thereto.

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## BEEBE v. BULL.

[12 WENDELL, 504.]

**REJECTION OF A DEMAND OFFERED AS A SET-OFF IN A FORMER ACTION**, on a trial before referees, is no bar to a subsequent action thereon, if such demand could not legally have been allowed as a set-off.

**REFEREES STAND IN THE PLACE OF A JURY** in such a case.

**WHERE PART OF A WITNESS' TESTIMONY IS COMPETENT**, an objection to the whole of it is too broad, and must be disallowed.

**DECISION OF REFEREES ON A COLLATERAL POINT** is not evidence in a subsequent action directly involving that question.

**ERROR** from the common pleas, in an action of assumpsit for work, labor, and services, brought by Bull against Beebe. The defendant pleaded, among other things, that in a previous action brought by him against Bull, the latter, at the hearing before the referees, submitted the present demand as a set-off and the same was passed upon by the referees, etc. At the trial, it appeared, by a special report of the referees in the former action, as well as by parol, that the present demand, which was for the transportation of certain goods, was exhibited in the former action as a set-off by the plaintiff here, who was then defendant; that though the goods were transported for Alvah Beebe, then plaintiff, now defendant, it was under an agreement that the same should be applied to the payment of a certain partnership account against Bull, and in favor of the firm of Jedediah and Alvah Beebe, which firm had been recently dissolved, and the accounts assigned to the said Alvah; and that the referees therefore rejected the set-off and left the demand to be applied on the partnership account. The court held the present action was not barred. Walbridge, Bull's attorney in the former action, testified that he prepared the bill of particulars submitted in that action without consultation with his client, and that the latter, on hearing of it, objected, and said the prices were too low. The defendant objected to this testimony, but the court admitted it. Verdict for the plaintiff, and the defendant brought error, on exceptions to the above rulings.



*J. A. Spencer*, for the plaintiff in error.

*M. T. Reynolds*, for the defendant in error.

By Court, SUTHERLAND, J. The demand of the plaintiff in this suit was properly rejected as a set-off by the referees; it could not legally have been allowed. The defect was not in the proof, but in the nature of the demand. The goods were transported by Bull, upon an agreement with Alvah Beebe, to pay the partnership account of Jedediah and Alvah Beebe. This was his express agreement. There was an express appropriation by the parties of these services to the partnership account. Bull could not have recovered the amount from Beebe, unless he had refused to credit it to him as the partnership demand, and of course he could not set it off against an individual account of Alvah Beebe. The rule upon this subject is correctly stated by the chief justice in *McGuinty v. Herrick*, 5 Wend. 245, as follows: If a party to a suit, either plaintiff or defendant, present a demand which is legal and proper to be allowed if supported by sufficient testimony, and the jury pass upon it and disallow it, such demand can not be recovered in another suit: 2 Johns. 210; 6 Id. 168; 2 Id. 229; 16 Id. 136; 15 Id. 229, 432. The error of the jury may be ground for granting a new trial when brought up on a case, or for reversing the judgment when brought up on certiorari; but it can not be received collaterally. The verdict is conclusive, unless it appears that the claim rejected by them could not legally have been allowed. The cases of *Bull v. Hopkins*, 7 Johns. 22, and *Wolfe v. Washburn*, 6 Cow. 262, fully support the opinion that the party is not precluded where the demand rejected by the jury could not legally have been allowed. Such was clearly the case here upon the evidence before the referees, and the former trial is no bar to this action. The referees undoubtedly stood in the place of a jury, and their decision in relation to this matter would produce the same legal consequences: 12 Johns. 219.

The exception to Walbridge's testimony was too broad. A part of it was clearly competent, but the objection went to the whole, and was therefore properly overruled. The objectionable part of the evidence was also very unimportant. The plaintiff was not concluded, by the decision of the referees that his demand could be recovered from the partnership only, from subsequently bringing an action against Alvah Beebe. If it was, in truth, a demand against the firm, as Beebe proved to the satisfaction of the referees on the former trial, he should

have set up that defense in this action. The decision of the referees was not evidence for him on that point.

Judgment affirmed.

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DEMAND PROPERLY EXCLUDED AS NOT LEGALLY A SET-OFF may be sued in another action: *Ives v. Goddard*, 1 Hilt. 435. Generally, a claim or defense which was inadmissible in a previous action, but was nevertheless litigated and finally disallowed, may be litigated anew notwithstanding such disallowance: *Baker v. Rand*, 13 Barb. 160. But where a demand is proper to be allowed as a set-off, but is rejected because not sufficiently proved, it can not be made the foundation of another action: *Hatch v. Benton*, 6 Id. 34, all citing the principal case. It is cited also in *Ansley v. Pearson*, 8 Ala. 436, where an action was brought against a defendant on two notes indorsed by him, and the case was submitted to the court, who gave an opinion in favor of the plaintiff on both notes, but afterwards permitted him to withdraw one, and it was held that he was not precluded from subsequently suing the note so withdrawn.

SPECIFIC GROUNDS OF OBJECTION TO THE COMPETENCY and legality of evidence must be pointed out: *Carter v. Bennett*, 4 Fla. 338; *Gladden v. State*, 12 Id. 573; *Elwood v. Deifendorf*, 5 Barb. 406. And not only so, but the ground of objection can not be shifted in the appellate court, especially where, if the objection urged in the appellate court had been made in the court below, it might have been obviated: *Briggs v. Smith*, 20 Barb. 418. Where a letter is offered as a whole, and part of it is inadmissible, the whole of it must be excluded: *Gardner v. Barden*, 34 N. Y. 438. In all these cases *Beebe v. Bull* is referred to as an authority.

ADMISSION OF IMPROPER TESTIMONY IS NOT A GROUND FOR REVERSAL, where the whole case, and not merely the exceptions, is before the court, and the court can see that the party has not been prejudiced: *Trimmer v. Trimmer*, 13 Hun, 183, citing the principal case, and also *Crary v. Sprague*, ante, 110.

The case is cited also in *Rich v. Rich*, 16 Wend. 666, to the point that the effect of an exception may often be neutralized in the course of the trial, even by the party against whom it is taken; and in *Cummings v. Morris*, 25 N. Y. 634, to the point that until the affairs of a partnership are closed or settled, it can not be said that any debt exists from one partner to the other.

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## BLOOD v. GOODRICH.

[12 WENDELL, 525.]

WHERE A SEALED CONTRACT IS EXECUTED BY AN AGENT, A PAROL ACKNOWLEDGMENT by the principal that he had authority, is competent evidence of an authority under seal.

ASSUMPSIT to recover damages for the breach of an agreement to convey land, executed by Kingsbury, defendant, for himself and Goodrich and Champion, the other defendants. A former decision in the cause is reported in *Blood v. Goodrich*, 24 Am. Dec. 121, where the facts as they appeared at that time are

stated. On the new trial granted by that decision, some additional evidence was produced, the substance of which is stated in the opinion. Owing to certain rulings at the trial, the plaintiff submitted to a nonsuit, and moved for a new trial. The questions arising on this motion sufficiently appear from the opinion.

*H. Brown and J. O. Morse*, for the plaintiff.

*J. A. Spencer*, for the defendants.

By Court, SAVAGE, C. J. This cause comes up a second time on a motion for a new trial. The main question now is the same which was presented on the former motion, to wit, whether there was sufficient competent evidence to submit to the jury the question whether all the defendants had executed the contract of December 11, 1828; or, in other words, whether there was evidence to justify the jury in finding that Kingsbury executed the contract by virtue of an authority under seal.

On the former motion we considered the rule of law to be, that "an authority to execute a deed must be given by deed." And by this rule the evidence produced on the first trial was tested, and declared to be insufficient. The evidence on the second trial must be tested by the same rule; but the plaintiff has done on the second trial what he did not do on the first—he has entitled himself to give secondary evidence of the existence of a power of attorney. On the former trial, as on this, the execution of the contract by Kingsbury was fully proved. There was also sufficient evidence to submit to a jury, and to authorize them in finding that Kingsbury had competent authority from Goodrich; but as to Champion, we were of opinion the evidence was not sufficient. The only testimony in relation to an authority from Champion was his declaration to Judge Brown, that he owned lands in the state of Ohio, in company with the other defendants in this cause, and that Kingsbury was their agent to sell and dispose of these lands. In addition to this testimony, the plaintiff has now produced G. Wilcox, who went with the plaintiff a few days after the execution of the contract, and called personally upon Goodrich, at Utica, and upon Champion, at Rochester. The contract was shown to Goodrich, who said that the defendants owned a tract of land together in Ohio; that Kingsbury was empowered to act for him and Champion in the sale of the same; that it was the same as if they, Goodrich and Champion, had done it.

At Rochester the plaintiff and the witness went into Cham-

pion's office; the plaintiff produced the contract, and showed it to Champion, who said that what was done by Kingsbury was well; that they owned lands together in Ohio; that Kingsbury was agent for them, to sell their Ohio lands, and that Champion wrote a letter by witness to E. Brown, of Bloomfield, Ohio, and requested witness and plaintiff to call on Brown to show them the lands. On cross-examination, the witness stated further, that Goodrich said, when the contract was shown to him, that Kingsbury was empowered to act as their agent, and he would ratify whatever Kingsbury did, and act upon it by way of deeding the land; that all would execute deeds. Champion said that whatever bargain Kingsbury or Goodrich made should be ratified by him; that they owned the lands together; that Kingsbury was agent to act for him and Goodrich. It is also in evidence that Champion, on the sixteenth of December, 1828, executed a power of attorney to Goodrich, authorizing him to sell and convey certain lands in the same town of Bloomfield, in Ohio, which lands were owned by himself and Goodrich.

Had Goodrich and Champion, when the contract was presented to them, admitted that Kingsbury had executed it by virtue of a power of attorney for that purpose, could it be doubted that such an admission would be conclusive? 7 Wend. 136. In such case the defendants could not object that parol evidence could not be given of a written instrument, because it was their own fault that it was not produced. Due notice had been given to them to produce it, and the paper being in their possession, and withheld, the plaintiff had a right to give secondary evidence of its contents. What was said by these defendants was certainly calculated to produce the impression upon the plaintiff, that the contract was properly executed, and by virtue of full power and authority. The contract itself was produced and presented to each; which was tantamount to asking each, "Sir, is that your deed?" Champion answers, that what was done by Kingsbury was well; that Kingsbury was his agent to sell the lands, and he wrote a letter to another agent in Ohio, with a view to aid in and promote the consummation of the contract.

That the authority was by a proper power of attorney under seal, may fairly be inferred from the copy of a power given by Champion to Goodrich but a few days subsequent to the contract executed by Kingsbury with the plaintiff. There is no room, therefore, for the supposition that a mere parol authority was

intended; the parties knew what sort of authority was proper in such a case; and as it has been adopted in one case, it is fairly inferable that it had been adopted in the other. In the former discussion of this case, 9 Wend. 76 [24 Am. Dec. 121], and also in *Hanford v. McNair*, 9 Id. 56, the case of *Steiglitz v. Egginton*, 1 Holt, 141, was referred to, in which the chief justice, after asserting the doctrine that an attorney who executes a sealed instrument must have an authority under seal, concludes by saying that no subsequent acknowledgment will do. The chief justice, no doubt, intended to say that no subsequent acknowledgment by parol could supersede the necessity of an authority under seal, by virtue of which the deed was executed, but he does not say, nor did he intend to say, that a parol acknowledgment by the party of the existence of an authority under seal could not be admitted. In that case the attorney confessedly had not a sufficient authority, and in such a case the proposition was undoubtedly true, that no subsequent acknowledgment will do. If the contract, when executed under seal, was not the contract of the principals, it did not become so by a subsequent acknowledgment of it. Most emphatically would this be so in a case like the present, where the contract is for the sale of lands, in respect to which a parol contract would be void. No objection of that kind can properly be made to the evidence in this case; this is not a parol acknowledgment and ratification of a sealed instrument executed originally without authority, but an admission by parol that the contract was originally legally and properly executed. Such evidence is proper, and if uncontradicted or unexplained, conclusive upon the party making the admission. The evidence offered in this case was sufficient, and should have been received.

The decision of this point alone is sufficient to entitle the plaintiff to a new trial. If the fact be proved that Kingsbury had power to make the contract which was executed by him, the same evidence proves his power to complete the negotiation and contract in relation to those lands. The propriety, therefore, of admitting much of the testimony which was rejected, depends upon the decision of the first point. The subsequent letters and declarations and parol contracts made by Kingsbury and Goodrich, should have the same effect as if made by Champion also. Champion had given a formal authority to Goodrich to convey lands in the same town of Bloomfield, which were owned by them jointly, at the same time when he

admitted the power of Kingsbury, and also of Goodrich; and to this testimony there was no objection. The plaintiff also offered to show what, for the purpose of this motion, we must consider as proved, that long after the conveyances had been executed by Blood to Hale and Robinson, Champion stated that they had been executed at Goodrich's request, and by his (Champion's) authority, and that they all had received the avails of such sale. This testimony was proper, and should have been received.

What should be the measure of damages in the event of a recovery, was a question not agitated on the trial, and one that could not be properly raised until the plaintiff had established a right to recover something. It would therefore be traveling out of the bill of exceptions to express an opinion upon it.

New trial granted. Costs to abide the event.

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**AUTHORITY OF AGENT TO EXECUTE A SEALED CONTRACT.**—See the former decision of the supreme court in this case, reported in *Blood v. Goodrich*, 24 Am. Dec. 121, and note. That a contract under seal, executed by an agent, without authority, can not be rendered binding by a subsequent parol ratification, is a point to which the principal case is cited, in *Taylor v. Robinson*, 14 Cal. 400; *Peterson v. Mayor etc. of New York*, 4 E. D. Smith, 417; *Vanderbilt v. Persse*, 3 Id. 430. In *Brady v. Mayor etc. of New York*, 7 Abb. Pr. 248; S. C., 2 Bosw. 187, the case is cited as authority for the position that an act done by the officers of a corporation, in violation of its charter, can not be rendered valid by a subsequent ratification by the corporation.

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## VANDERZEE v. MCGREGOR.

[12 WENDELL, 545.]

**PRIVILEGED COMMUNICATION.**—An action for libel will not lie, without proof of express malice, for presenting to a board of excise, a remonstrance against granting the plaintiff a tavern license, charging him with being a professional pettifogger, and stirring up suits, and endeavoring to have justices' courts appointed at his tavern, such a communication being privileged.

**PRESENTING SUCH REMONSTRANCE TO OTHERS FOR SIGNATURES,** without proof of express malice, is not actionable.

**ACTION** for libel, for presenting to the board of excise of the town of Wilton a memorial, signed by the defendant and others, remonstrating against issuing a tavern license to the plaintiff, and stating that he was a professional pettifogger, and stirred up suits, and endeavored to have justices' courts held at his tavern. The presentation of the memorial was proved, and also that, before presenting it, the defendant read it to several

persons, and asked them to sign it. Motion to set aside a nonsuit entered, upon these facts being proved.

*W. L. F. Warren*, for the plaintiff.

*J. Ellsworth*, for the defendant.

By Court, SUTHERLAND, J. The memorial in this case was clearly a privileged communication within the authority of *Thorn v. Blanchard*, 5 Johns. 508, where the doctrine is discussed at length by the counsel, and all the authorities are collected. The libel in that case was a petition to the council of appointment, praying the removal of the plaintiff from the office of district attorney, and assigning as the ground of such request, that the plaintiff grossly abused and perverted the powers of his office. It was signed by the defendant and many other citizens, and the plaintiff was in fact removed from office. It was held that the nature of the communication, and the occasion on which it was made, prevented the legal inference of malice, and that the plaintiff could not recover without proving express malice. The leading cases on the point are: 1 W. Bl. 386; Bull. N. P. 8-10; Cro. Jac. 91; *Jarvis v. Hatheway*, 3 Johns. 180 [3 Am. Dec. 473], and 4 Serg. & R. 424. The question of malice is generally submitted to the jury, accompanied with proper instructions from the court; but where there is no evidence of malice, except the mere publication, and that is of a privileged character, if the jury should find a verdict for the plaintiff, it would be the duty of the court to grant a new trial. When the judge, therefore, upon the mere evidence of publication, nonsuits the plaintiff, the nonsuit ought not to be set aside; there is no legal evidence of malice whatever, and without that the action is not sustained; the jury have nothing to pass upon. Perhaps the presenting the petition to different individuals for their signature might be considered a publication of the libel, and not covered by the privilege; but I am inclined to think that if the nature of the communication is such as to be privileged, when presented to the tribunal for which it was originally designed, that it can not be a libelous publication of it to present it to others for their signature. The nature of the transaction requires that the memorial should be circulated to obtain signatures; and unless express malice be shown, the conclusion of law, within the principle above adverted to, is, that it was circulated with a *bona fide* intent of obtaining signatures, and not to propagate slanderous charges against the party.

New trial denied.

PRIVILEGED COMMUNICATIONS, being *prima facie* excusable, actual malice must be shown before an action of libel can be maintained therefor: *King v. Root*, 21 Am. Dec. 102; *Bradley v. Heath*, 22 Id. 418. But if the defendant knew such communication to be false and made the charge to gratify his malice, he is liable: *King v. Root*, 21 Id. 102; for express malice does away with the privilege: *Lathrop v. Hyde*, 25 Wend. 449; *Perkins v. Mitchell*, 31 Barb. 467; both citing the principal case. But where a communication is privileged, the law will not imply malice from its falsity: *Fowles v. Bowen*, 30 N. Y. 28. It is the duty of the court, in such a case, to nonsuit the plaintiff without submitting the question of malice to the jury, where the words used do not indicate malice, and there is no other evidence of malice: *Liddle v. Hodges*, 2 Bosw. 546, also citing *Vanderzee v. McGregor*. As to what constitutes a privileged communication, see the note to *Bodwell v. Osgood*, 15 Am. Dec. 232. A petition to the legislature, protesting against the reappointment of a justice, will not support an action for libel, though it be false: *Harris v. Huntington*, 4 Id. 728. But a communication addressed to a school committee, attacking the character of a teacher, if false and inspired by actual malice, is actionable: *Bodwell v. Osgood*, 15 Id. 228. Charges presented to a lodge of Odd Fellows against a member of the order are privileged; so is the presentation of such charges to a member for signature: *Streety v. Wood*, 15 Barb. 109, citing the principal case. A report of a committee of a college of pharmacy intended to be presented, and which was presented, to the secretary of the treasury, respecting the importation of spurious drugs, and charging the plaintiff with gross violation of his duty as an inspector of drugs, made in good faith and for probable cause, and not maliciously, was held, on the authority of *Vanderzee v. McGregor*, to be privileged, in *Van Wyck v. Aspinwall*, 17 N. Y. 193; *Van Wyck v. Guthrie*, 4 Duer, 274. So words spoken to a policeman, charging one in good faith and upon probable cause with theft, are privileged: *Smith v. Kerr*, 1 Edm. 193, also citing the principal case. As to the privilege generally attending words spoken in the course of judicial and quasi judicial proceedings, see *McMillan v. Birch*, 2 Am. Dec. 426, and note; *Hardin v. Cumstock*, 12 Id. 427 and note; *Stackpole v. Heanen*, 17 Id. 187 and note; *Allen v. Crofoot*, 20 Id. 647 and note. In *Howard v. Thompson*, 21 Wend. 326, the communication in the principal case is referred to incidentally as one of a class of writings sometimes prosecuted as libels.

## BOORMAN v. JENKINS.

[12 WENDELL, 566.]

**EVIDENCE OF A USAGE AS TO THE MODE OF SELLING COTTON BY SAMPLE**, and as to the taking of samples by brokers and the offering of them to customers for inspection, is admissible in an action on the warranty arising upon such a sale.

**PAROL EVIDENCE IS ADMISSIBLE TO APPLY A WRITTEN CONTRACT** to the subject-matter, and in some instances to explain expressions used in a peculiar sense, by particular persons as applied to particular subjects.

**WHERE THERE IS A WRITTEN CONTRACT**, EVIDENCE OF A USAGE is in many instances admissible to annex incidents to the written instrument concerning which it is silent.

**EVIDENCE OF A USAGE BY A COTTON BROKER** not to make entry of the fact that sales of cotton made by him were made by sample, is admissible,



where upon a particular sale there is no reference in the entry in his book, and in the sale note and bill of parcels, that the sale was by sample, and the sale may then be shown by parol to have been so made.

**SALE BY SAMPLE IS PER SE A WARRANTY** that the bulk shall correspond with the sample.

**EVERY SALE OF PACKED COTTON IS A SALE BY SAMPLE**, of necessity, and by established usage.

**WHERE ANY SALE OF COTTON IS CLAIMED TO BE AN EXCEPTION** to this rule, the burden of proof rests upon the party asserting that fact.

**OFFER TO RETURN GOODS SOLD WITH A WARRANTY**, either express or implied, is not necessary before bringing an action for damages for the breach of such warranty.

**PURCHASER HAVING PAID THE PURCHASE MONEY** for goods sold to him with a warranty, is not precluded from maintaining an action on the warranty, although he made payment after notice from a purchaser from him that the goods were defective, but before the extent of the damage was ascertained.

**AMENDABLE VARIANCE BETWEEN THE DECLARATION** and the proof is no ground of nonsuit.

**ERROR** from the superior court of New York city, in an action for a breach of warranty, arising on a sale of eighty-nine bales of cotton by sample, a large part of said cotton having turned out to be damaged. At the trial, it appeared that the cotton was purchased by the plaintiffs through certain cotton brokers; that when the plaintiffs applied to the brokers, the latter exhibited samples of a lot of cotton belonging to the defendants; that the plaintiffs made an offer therefor, which was communicated to and accepted by the defendants; that an entry of the sale, of which a copy was given to each of the parties, was made in the brokers' books, specifying the date, the names of the parties, the number of bales, the price, and the length of the credit, but making no mention of the fact that the sale was by sample or that there was any warranty.

It was testified by the brokers, against the objection of the defendants, that the sale was by sample, but that it was not their custom to mention that fact in their entries of sales made by sample. They testified also that neither they nor the plaintiffs saw the cotton at or before the sale; that there was no offer to exhibit it, and that the sale was made entirely through them. It further appeared, that an agent of the brokers attended when the cotton was delivered, and inspected and rejected certain bales as having been damaged, the defendants having stated, when they accepted the offer of the plaintiffs, that some of the cotton was damaged by being carried on deck, and that the damaged bales could be rejected when delivery was made. The bill of parcels produced by the plaintiffs, as having been

received from the defendants, made no mention of a sale by sample. The usage of trade in New York, with respect to the mode of selling cotton by sample, and as to the manner of taking the samples, was proved; from which it appeared that the samples were usually taken by the agents of the cotton brokers, by permission of the owners, and kept on exhibition in the brokers' warehouses, and that the samples were taken by means of an instrument called a gimlet, which was inserted in the bale only to the depth of two or three inches. It further appeared, that the taking of samples by a broker gave him no authority to sell, but that it was his duty to communicate offers of purchase to the owner, who accepted or rejected them. It was proved to be the usage also, to reject, on delivery, all cotton which was externally damaged, whether anything was said about it in the contract or not. The evidence as to usage was objected to by the defendants. It appeared also that the defendants knew the usage as to taking samples, etc.; that the brokers employed in this instance had general permission to take samples of their cotton. The brokerage was paid by the defendants. It appeared also that the plaintiffs sold the cotton by sample to the Dorchester Cotton and Iron Factory; that it turned out upon examination that much of it was damaged, of which the plaintiffs were notified before the payment of their note to the defendants; that the Dorchester company sued the plaintiffs on their warranty, of which the plaintiffs gave the defendants notice, and asked them to defend the action, which they declined; that a judgment for three hundred and twenty-two dollars and fifty cents was recovered against the plaintiffs, which they paid. The dates of these several occurrences are stated in the opinion. The damaged condition of the cotton was fully proved. It was also proved that the plaintiffs had paid at maturity their note to the defendants for the purchase money, which was made payable ninety days after the sale.

The defendants moved for a nonsuit on the grounds: 1. That this was not a sale by sample, because the brokers' entry, the bill of parcels, etc., referred to no samples, because the defendants had not ordered the samples drawn or offered for inspection, and because the brokers were not their agents. 2. That the plaintiffs had an opportunity to examine the cotton, and that they did so at the time of delivery, by their agent, who rejected some of the bales. 3. That the plaintiffs had not returned or offered to return the cotton, and had disabled themselves from doing so. 4. That the plaintiffs should have set up

the alleged breach of warranty by way of defense to their note. 5. That there was a variance between the declaration and the evidence, the declaration not stating that ninety days' credit was given. Motion overruled. The defendants then introduced some evidence tending to show that the cotton was purchased upon an actual inspection by the brokers' agent at the time of delivery; that they had the cotton on consignment; and that it was kept openly in their store where the plaintiffs could have examined it. The question as to whether the sale was by sample or by actual inspection was left to the jury by the judge, as also the question whether, by original appointment or by subsequent ratification of their acts, the brokers were the defendants' agents in this sale. Verdict and judgment for the plaintiffs, and the defendants brought error.

*P. W. Radcliff and S. P. Staples*, for the plaintiffs in error.

*H. Ketchum and T. Fessenden*, for the defendants in error.

By Court, SAVAGE, C. J. I will briefly notice the exceptions taken at the trial, in the order in which they arose.

The first three exceptions relate to the usage of those in the cotton trade, both merchants and brokers. There are certain usages of trade which are adhered to by all persons in that particular trade, which by common consent acquire the form of law. It is true, that such usages can not control or alter the settled law. There could be no well-founded objection to the testimony given in this case as to the mode of effecting sales by sample, the custom of brokers to take samples, and the offer of them for the inspection of their customers. As samples were never taken, but by consent of the owners, the fact of their being taken was a circumstance supporting the proposition that the brokers in this case were authorized to make the sale. It is very immaterial in this case whether this testimony was strictly admissible or not, in so far as it related to the authority of the brokers, and the usage to reject the bales which appeared to be damaged, because it is in proof that an agreement existed, that the bales externally injured should be rejected; and the subsequent acts of the defendants below, acquiescing in the sale, delivering the cotton, and paying the brokerage, are abundant evidence of the authority of the brokers. To the evidence of the recovery against the plaintiffs by the Dorchester factory, there was no exception.

The next questions arise upon the motion for a nonsuit, and it is insisted that the sale was not a sale by sample, for various

reasons, and principally because the written evidences of the sale, to wit, the entry in the brokers' book, the bought and sold note, and the bill of parcels, contain no reference to a sale by sample. This involves the inquiry how far parol evidence is admissible in reference to contracts which have been reduced to writing. It is not my purpose to discuss this subject at large, but to refer to some principles applicable to this case. I assume as correct the proposition that parol evidence is not admissible to contradict, alter, or vary a written instrument, either when required by law to be in writing, or when entered into by the agreement of the parties, where no writing is necessary to the validity of the agreement: 3 Stark. Ev. 996, 1002, *et seq.* Where parties have made their bargain by parol, as they are usually made in the first instance, and then have committed it to writing, the presumption is that they have written as much as they deemed material. The rule in such case is, that the verbal contract being merged in the writing, that shall control, and shall not be contradicted by parol, though it may be explained if ambiguous. There are exceptions which it is not important now to notice. But parol evidence may be given to apply the written contract to the subject-matter, in some instances, to explain expressions, used in a peculiar sense, when used by particular persons and applied to particular subjects. Hence mercantile instruments are to be expounded according to the usage and custom of merchants: 3 Stark. Ev. 1033.

It is perfectly right, and consistent with fair dealing, to give effect to language used in a contract, as it is understood by those who make use of it. In ordinary transactions, it must be understood as mankind at large understand it; but where, in any particular trade, certain expressions acquire a peculiar meaning from the manner in which they are used, and the subjects to which they are applied, as was said by Chief Justice Gibbs, in *Birch v. Depeyster*, 1 Stark. Cas. 167, evidence may be received of mercantile usage, to show the meaning of the term, just as you look into a dictionary to ascertain the meaning of words; though in that case he went farther, and permitted a conversation previous to entering into a written contract, to ascertain the meaning of the words, privilege and primage, as used between the owners of a ship and the captain. It is true that where words have acquired a known legal meaning, it can not be shown that they were used in a different sense, yet, in many instances, evidence of usage is admissible for the purpose of annexing incidents to a written instrument,

concerning which the instrument is silent. This rests upon the presumption that the parties did not carry out the whole of their intention, but meant to be guided by usage in similar dealings: 3 Stark. 1038. So instances are given where the law annexes a meaning to terms apparently in contradiction to the writing. A note payable on its face in sixty days means a note payable in sixty-three days. So a note payable at a bank must be paid in banking hours. These usages are considered evidence of the assent of the parties to comply with them. I do not therefore see any objection to the evidence of usage given by the broker, as to the manner of making his entries. If it does not prove a warranty in the sale, neither does it disprove it; it leaves the instrument to the construction of law upon its terms, connected with the subject-matter and the parties concerned in the transaction.

I fully subscribe to the general doctrine, that in sales of personal property, the vendor is not liable for any defect in the article sold, without fraud or warranty. When the purchaser has an opportunity of examining the article which he purchases, the rule *caveat emptor* applies. There are exceptions, but they are not important in the decision of this case. If there is anything settled in relation to mercantile law, it must be considered settled in this court, that a sale by sample is *per se* a warranty that the bulk shall correspond with the sample.

This results from the principles already referred to, to wit, that the rule *caveat emptor* applies where the purchaser has an opportunity to examine the articles which he purchases. Cotton is sold by the bale. How can the purchaser examine the article? Only externally and superficially, and the interior only to a small extent. The instruments with which the samples are taken in general are from eight to twelve inches in length, and samples are in fact taken from about four inches. Such is the proof in this case; and it is further proved, that the damage in the middle of the bales could not have been discovered without opening the bales. Here is a good reason why *caveat emptor* should not apply. You can not examine the article without opening the bales. That is never done; it would not be permitted, and would be attended with great expense and inconvenience. Hence, as I have heretofore said in the case of the *Oneida Manufacturing Company v. Lawrence*, 4 Cow. 444, every sale of packed cotton is a sale by sample. It is so by the usage of trade, which is founded upon general convenience and consent: that usage is shown in this case.

pion's office; the plaintiff produced the contract, and showed it to Champion, who said that what was done by Kingsbury was well; that they owned lands together in Ohio; that Kingsbury was agent for them, to sell their Ohio lands, and that Champion wrote a letter by witness to E. Brown, of Bloomfield, Ohio, and requested witness and plaintiff to call on Brown to show them the lands. On cross-examination, the witness stated further, that Goodrich said, when the contract was shown to him, that Kingsbury was empowered to act as their agent, and he would ratify whatever Kingsbury did, and act upon it by way of deeding the land; that all would execute deeds. Champion said that whatever bargain Kingsbury or Goodrich made should be ratified by him; that they owned the lands together; that Kingsbury was agent to act for him and Goodrich. It is also in evidence that Champion, on the sixteenth of December, 1828, executed a power of attorney to Goodrich, authorizing him to sell and convey certain lands in the same town of Bloomfield, in Ohio, which lands were owned by himself and Goodrich.

Had Goodrich and Champion, when the contract was presented to them, admitted that Kingsbury had executed it by virtue of a power of attorney for that purpose, could it be doubted that such an admission would be conclusive? 7 Wend. 136. In such case the defendants could not object that parol evidence could not be given of a written instrument, because it was their own fault that it was not produced. Due notice had been given to them to produce it, and the paper being in their possession, and withheld, the plaintiff had a right to give secondary evidence of its contents. What was said by these defendants was certainly calculated to produce the impression upon the plaintiff, that the contract was properly executed, and by virtue of full power and authority. The contract itself was produced and presented to each; which was tantamount to asking each, "Sir, is that your deed?" Champion answers, that what was done by Kingsbury was well; that Kingsbury was his agent to sell the lands, and he wrote a letter to another agent in Ohio, with a view to aid in and promote the consummation of the contract.

That the authority was by a proper power of attorney under seal, may fairly be inferred from the copy of a power given by Champion to Goodrich but a few days subsequent to the contract executed by Kingsbury with the plaintiff. There is no room, therefore, for the supposition that a mere parol authority was

intended; the parties knew what sort of authority was proper in such a case; and as it has been adopted in one case, it is fairly inferable that it had been adopted in the other. In the former discussion of this case, 9 Wend. 76 [24 Am. Dec. 121], and also in *Hanford v. McNair*, 9 Id. 56, the case of *Steiglitz v. Egginton*, 1 Holt, 141, was referred to, in which the chief justice, after asserting the doctrine that an attorney who executes a sealed instrument must have an authority under seal, concludes by saying that no subsequent acknowledgment will do. The chief justice, no doubt, intended to say that no subsequent acknowledgment by parol could supersede the necessity of an authority under seal, by virtue of which the deed was executed, but he does not say, nor did he intend to say, that a parol acknowledgment by the party of the existence of an authority under seal could not be admitted. In that case the attorney confessedly had not a sufficient authority, and in such a case the proposition was undoubtedly true, that no subsequent acknowledgment will do. If the contract, when executed under seal, was not the contract of the principals, it did not become so by a subsequent acknowledgment of it. Most emphatically would this be so in a case like the present, where the contract is for the sale of lands, in respect to which a parol contract would be void. No objection of that kind can properly be made to the evidence in this case; this is not a parol acknowledgment and ratification of a sealed instrument executed originally without authority, but an admission by parol that the contract was originally legally and properly executed. Such evidence is proper, and if uncontradicted or unexplained, conclusive upon the party making the admission. The evidence offered in this case was sufficient, and should have been received.

The decision of this point alone is sufficient to entitle the plaintiff to a new trial. If the fact be proved that Kingsbury had power to make the contract which was executed by him, the same evidence proves his power to complete the negotiation and contract in relation to those lands. The propriety, therefore, of admitting much of the testimony which was rejected, depends upon the decision of the first point. The subsequent letters and declarations and parol contracts made by Kingsbury and Goodrich, should have the same effect as if made by Champion also. Champion had given a formal authority to Goodrich to convey lands in the same town of Bloomfield, which were owned by them jointly, at the same time when he

the variance at all material; but if it was, it was no ground of nonsuit at the trial, being amendable: 2 Rev. Stat. 406, sec. 79.

The charge of the learned judge at the trial was also excepted to, but, in my judgment, without cause. He instructed the jury to find, as questions of fact, whether the sale was by sample; whether the brokers had authority by original appointment or subsequent ratification; or whether the plaintiffs bought upon their own examination, without relying upon the samples: these were all questions of fact, proper for their decision. The charge was right, and all the previous decisions were right; consequently the judgment of the superior court should be affirmed.

Judgment affirmed.

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EVIDENCE OF A USAGE WHERE THERE IS A WRITTEN CONTRACT, admissibility of: See *Eager v. Atlas Insurance Co.*, 25 Am. Dec. 363 and note, and *Pavey v. Burch*, 26 Id. 682; see also the note to *Bradford v. Manly*, 7 Id. 130. The principal case is cited as an authority for the position that evidence of a usage which is reasonable and lawful may be received to explain the terms of a written contract, if such usage be not contrary to the express language of the contract, in *Dana v. Fiedler*, 1 E. D. Smith, 478; *Northern R. R. Co. v. Page*, 22 Barb. 132; *Beardsley v. Davis*, 52 Id. 164; *Walls v. Bailey*, 49 N. Y. 470.

THAT PAROL EVIDENCE IS ADMISSIBLE TO SHOW A WARRANTY, where the memorandum or bill of parcels makes no mention of a warranty, is held on the authority of *Boorman v. Jenkins*, in *Cassidy v. Begoden*, 38 N. Y. Sup. Ct. (6 Jones & S.) 182.

SALE BY SAMPLE, WARRANTY IMPLIED ON.—See *Beebe v. Robert*, *ante*, 132, and other cases in this series referred to in the note thereto. The principal case is cited as an authority on this point, in *Hart v. Wright*, 17 Wend. 271; *Magee v. Billingsley*, 3 Ala. 696; and *Ricks v. Dillahunty*, 8 Port. 140. In *Koop v. Handy*, 41 Barb. 464, it was held that on a sale of *divi divi*, where the memorandum of sale or sale note made no mention of a sale by sample, the law would not imply from the nature of the goods that the sale was made by sample, and that parol evidence was not admissible to show that it was so made. Clerke, J., delivering the opinion, thus referred to and distinguished the principal case: "It may be well to notice a point taken by the counsel of the plaintiffs, in which he insisted that the law, in the sale of commodities like *divi divi*, will raise an implied warranty. He insisted, even if this memorandum could be considered a complete contract, that according to *Boorman v. Jenkins*, 12 Wend. 574, and *Waring v. Mason*, 18 Id. 425, the law implies a warranty, as in a sale, by sample, of cotton. If these cases take the sale of cotton by sample out of the general rule of the common law, so as to create an implied warranty, it must be, as the chancellor says, in the latter case, upon the ground that it is impossible, in the customary mode of examining and selling cotton in the bale in this country, for the purchaser to ascertain the defect, and that it is not within the principle of the common law rule of *caveat emptor*. We would not be justified, I think, even if there was a more positive and stronger current of authority in favor of cotton, to extend the exception to the article sold to the plaintiffs in this case. Neither was there



any proof, or any offer to prove, that it was impossible or extremely difficult for the purchaser to examine the article, from the manner in which it was packed or situated, in order to ascertain its condition."

**OFFER TO RETURN THE GOODS IS UNNECESSARY** to the maintenance of an action for a breach of warranty, on the sale of such goods: *Borrekins v. Bevan*, 23 Am. Dec. 85. So held in *Warren v. Van Pelt*, 4 E. D. Smith, 204, on the authority of the principal case. So, in *Whitney v. Allaire*, 4 Denio, 558, it was held, citing *Boorman v. Jenkins*, that the vendor can never complain that the vendee has not rescinded the sale before suing.

**MATERIAL VARIANCE CAN NOT BE CURED** by amending the declaration after verdict, so as to conform it to the proofs: *Cornwall v. Haight*, 8 Barb. 330, referring to the principal case as being one where the variance was wholly immaterial to the real question before the court.

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## PURPLE v. HORTON.

[13 WENDELL, 9.]

**A MASTER MASON IS NOT INCOMPETENT TO SIT AS A JUROR** in an action of slander wherein one of the parties belongs to the fraternity of free masons, and the other does not.

**IT IS NOT A FATAL VARIANCE IN SLANDER** that all the words laid in the declaration are not proved; it is sufficient that enough be proved to sustain the action.

**FACTS INDUCING BELIEF IN THE TRUTH OF THE CHARGES MADE** are not admissible in mitigation of damages.

**FACTS AND CIRCUMSTANCES MAY BE SHOWN IN MITIGATION** when they disprove malice, and do not tend to prove the charges or form a link in the chain of evidence to prove a justification.

**A JUSTIFICATION DOES NOT DISPROVE MALICE**, but confirms it.

**SLANDER.** There were various counts in the declaration, charging that the defendant said of the plaintiff, a physician, that he introduced small-pox in the town where he lived, in order to increase his practice, and that he had killed the defendant's brother by intentionally exposing him to the disease. General issue pleaded. The first charge was proved, but not the second, whereupon a nonsuit was moved for, but denied.

The defendant, then admitting that the charge he had made against the plaintiff was false, desired to offer certain facts and circumstances in evidence, to disprove his malice and for the purpose of mitigating damages. The evidence was rejected, and a verdict for three hundred dollars found against the defendant. On the trial of the cause, three challenges to jurors were interposed, one to Henry Burlingame, on the ground that he was a royal arch mason, and had taken an oath containing certain clauses appearing in the opinion; that the plaintiff was a

royal arch mason, and that the defendant was not at the time a member of the order of masons, having seceded therefrom, and that, therefore, Burlingame did not stand indifferent between the parties. The challenge was tried by triors, who decided that Burlingame was a competent juror. Challenges were also interposed to Griswold and Lull, for a similar reason, they being master masons, and having taken the following oath: "I, [name], of my own free will and accord, in presence of Almighty God and this worshipful lodge of master masons, erected to God, and dedicated to the holy order of St. John, do hereby and hereon most solemnly and sincerely promise and swear, in addition to my former obligations, that I will not give the degree of a master mason to any one of an inferior degree, nor to any other being in the known world, except it be to a true and lawful brother or brethren master masons, to or within the body of a just and lawfully constituted lodge of such, and not unto him or unto them whom I shall hear so to be, but unto him and them only whom I shall find so to be, after strict trial and due examination or lawful information received. Furthermore do I promise and swear, that I will not give the master's word, which I shall hereafter receive, within the lodge nor out of it, except it be on the five points of fellowship, and then not above my breath. Furthermore do I promise and swear, that I will not give the grand hailing sign of distress, except I am in real distress, or for the benefit of the craft when at work; and should I ever see that sign given, or the word accompanying it, and the person who gave it appearing to be in distress, I will fly to his relief at the risk of my life, should there be a greater probability of saving his life than losing my own. Furthermore do I promise and swear, that I will not wrong this lodge, nor a brother of this degree, to the value of one cent, knowingly, myself, nor suffer it to be done by others, if in my power to prevent it. Furthermore do I promise and swear, that I will not be at the initiating, passing, or raising a candidate at one communication, without a regular dispensation for the grand lodge of the same. Furthermore do I promise and swear, that I will not be at the initiating, passing, or raising a candidate in a clandestine lodge, I knowing it to be such. Furthermore do I promise and swear, that I will not be at the initiating of an old man in dotage, a young man in nonage, an atheist, irreligious, libertine, idiot, madman, hermaphrodite, nor woman. Furthermore do I promise and swear, that I will not speak evil of a brother

master mason, neither behind his back nor before his face, but will apprise him of all approaching danger, if in my power. Furthermore do I promise and swear, that I will not violate the chastity of a master mason's wife, mother, sister, or daughter, I knowing them to be such, nor suffer it to be done by others, if in my power to prevent it. Furthermore, do I promise and swear that I will support the constitution of the grand lodge of the state of New York, under which this lodge is held, and conform to all the by-laws, rules, and regulations of this or any other lodge of which I may, at any time hereafter, become a member. Furthermore do I promise and swear, that I will obey all regular signs, summons, or tokens, given, handed, sent, or thrown to me from the hand of a brother master mason, or from the body of a just and lawfully constituted lodge of such, provided it be within the length of my cable-tow. Furthermore do I promise and swear, that a master mason's secrets, given to me in charge as such, and I knowing them to be such, shall remain as secure and inviolate in my breast as in his own, when communicated to me, murder and treason excepted, and they left to my own election. Furthermore do I promise and swear, that I will go on a master mason's errand whenever required, even should I have to go barefoot and bareheaded, if within the length of my cable-tow. Furthermore do I promise and swear, that I will always remember a brother master mason when on my knees, offering up my devotions to Almighty God. Furthermore do I promise and swear, that I will be aiding and assisting all poor indigent master masons, their wives and orphans, wheresoever dispersed around the globe, as far as in my power, without injuring myself or family materially. Furthermore do I promise and swear, that if any part of this my solemn oath or obligation be omitted at this time, that I will hold myself amenable thereto, whenever informed. To all which I do most solemnly and sincerely promise and swear, with a fixed and steady purpose of mind in me, to keep and perform the same, binding myself under no less penalty than to have my body severed in two in the midst, and divided to the north and south; my bowels burnt to ashes in the center, and the ashes scattered before the four winds of heaven, that there might not be the least track or trace of remembrance remaining among men or masons of so vile and perjured a wretch as I should be, were I ever to prove willfully guilty of violating any part of this my solemn oath or obligation of a master mason; so help me God, and keep me steadfast in the due performance of

the same." A demurrer was interposed to this cause of challenge, and decided by the court against the challenge; to which the defendant excepted. Motion for a new trial.

*J. Clapp*, for the defendant.

*Buttolph and Thorp*, contra.

By Court, SAVAGE, C. J. The defendant moves for a new trial on the following grounds: 1. That improper persons were admitted to serve as jurors; 2. That there was a variance between the declaration and proof; 3. That proper evidence offered by the defendant was rejected by the judge; and, 4. That the verdict is against law and evidence.

The objection to Griswold and Lull, as jurors, is the same, and it takes the broad ground that a master mason is incompetent to sit as a juror in a cause wherein one of the parties belongs to the fraternity of freemasons. The authority of Blackstone is quoted to prove that the juror being of the same society or corporation is enough to exclude him. Mr. Justice Blackstone cites no authority for the *dictum*, but I have elsewhere seen Finch's law cited as authority for the whole paragraph; and the reason assigned for excluding as jurors all persons within the ninth degree, all who have been arbitrators in the same matter, or a juror in the same cause, etc., is because the cause of challenge assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor. Is it true that persons belonging to the same society or corporation are *ipso facto* prejudiced in favor of every person belonging to the same society or corporation, so that they can not decide a question of fact impartially between them and other persons? Whatever may have been the state of society in the days of Finch and Blackstone, it is not so now. This rule would exclude every stockholder in the same bank, every member of the same church, and every associate of the same benevolent society. We have many societies in which the members are extremely numerous, who have never heard of each other, and can have no inducements to favor persons who may belong to the same society, in preference to other individuals. The society of freemasons is supposed to be as numerous as any—the members spreading over Europe and America, embracing many thousands. Are all these persons so biased in favor of the members of that society that they can not find the fact truly from evidence to be produced before them, whether in an action of slander the defendants spoke the words charged in the declaration? I will

not say that there may not be cases where this rule is properly applicable, but there surely is no reason for its application in this case. Nor do I see anything in the oath of a master mason, as set forth in the challenge, which should create a disqualification. The defendant's counsel has referred to those parts of the obligation in which the master mason swears that he will apprise a brother of all approaching danger, if in his power—and the clause in which he swears that he will be aiding and assisting all poor indigent master masons, their wives and orphans, wheresoever dispersed around the globe, etc. These clauses enjoin the duties of benevolence and charity, but surely contain no evidence of bias or partiality in favor of brethren, or prejudice against others in matters in litigation. These challenges to Griswold and Lull, having been demurred to, were decided by the court.

The challenge against Burlingame was submitted to triors and the question of impartiality decided by them as a matter of fact; if they have decided against evidence, a new trial is the only way in which that error can be corrected. The evidence before them consisted of the oath taken by royal arch masons, and the testimony of several witnesses as to the construction given by the fraternity to the questionable clause, which is, "that he will aid and assist a companion royal arch mason, when engaged in any difficulty, and espouse his cause, so far as to extricate him from the same, if in his power, whether he be right or wrong." The juror challenged was examined as a witness, and testified that the oath he took was thus: "I will aid and assist a companion royal arch mason, when engaged in any quarrel, so far as to extricate him from the same, whether right or wrong." He stated that the oath was explained as follows: If he saw a brother engaged in any difficulty or quarrel with any one else, it was his duty to separate them, if possible, without inquiring whether the quarrel was right or wrong on his part. This witness gave other explanations to other parts of the obligation set forth in the challenge, and as to yet other parts, denied that they belonged to it at all; but they are not material here. He said that he never was in any manner prejudiced as a juror by his masonic obligations. Levi Farr gave a similar explanation to the oath. If a royal arch mason saw a brother in a quarrel, it was his duty to take him by the right arm and extricate him, without inquiring the cause. Perez Randall, John F. Hubbard, Hezekiah Read, Levi Bigelow, Richard W. Juliand, O. G. Randall, and Silas Holmes all con-

curred in the understanding of masons of the clause in the oath above set forth, and in the declaration, that there is nothing in masonic obligations contrary to moral duties. The bible is presented to them as the rule of their faith and practice, and the lectures point out the moral duties, and are considered binding. Mr. Hubbard stated that the words right or wrong were an interpolation, and did not belong to the obligation as given in the grand chapter. Upon this testimony the triors could not find the juror disqualified. It is next objected that the plaintiff should have been nonsuited for a variance between the declaration and proof: not that some of the actionable words were not proved substantially as laid, but that all the words laid were not proved. The plaintiff complains in the same count, that the defendant has charged him with having introduced the small-pox with a view to his own emolument, and also with destroying the life of his brother Ransom Horton. The plaintiff has proved the first charge, but not the second; and the defendant insists the plaintiff shall be nonsuited. It is a sufficient answer to say that the plaintiff proved enough to sustain his action. It is not necessary to prove all the words laid.

The principal ground for this motion seems to be the refusal of the judge to receive the evidence offered in mitigation. The counsel prefaced each of these offers with an entire disavowal of an intended justification, and a full admission of the falsity of the charge, and offered in mitigation facts and circumstances which induced the defendant to believe the charges true when made.

The charges proved to have been made against the plaintiff by the defendant, are: 1. The plaintiff introduced the small-pox into the town of Coventry for his own emolument; 2. That he gave the disease to Johnson's family and others intentionally, pretending to inoculate them for the kine pock; and 3. That he gave it to the defendant's brother, intending to give it to the defendant.

On the trial the defendant admits these charges are entirely false and groundless, and proposes to mitigate damages by showing facts and circumstances which induced him to suppose the charges true at the time they were made. If these facts and circumstances were sufficient to induce the defendant to suppose the charges true, are they not also sufficient to induce the jury to believe them true? That they tend to a justification, the defendant's counsel does not deny. Neither can it be

denied that the defendant seeks to secure himself from damages; not by showing that he spoke the slanders innocently, but by endeavoring to raise in the minds of the jury suspicions of the plaintiff's guilt, when he dare not put a justification upon the record, and when, for the purpose of this covert justification, he admits the charges false. His counsel argues the point in his favor as earnestly as if it had not been frequently decided. The doctrine of this court, on this subject, is familiar to every lawyer.

Facts and circumstances may be shown in mitigation when they disprove malice, and do not tend to prove the charges, or form a link in the chain of evidence to prove a justification. The defendant's counsel attacks this position, endeavors to show that this court was in entire error when this position was asserted in *Root v. King*, 7 Cow. 613, and undertakes to prove it by the English cases which were there overruled. He insists also that this point was overruled by the court of errors in the same cause, though they affirmed the judgment; and finally, that this court have themselves abandoned the doctrine, in the case of *Gilman v. Lowell*, 8 Wend. 573 [24 Am. Dec. 96]. In all this, to say the least, the counsel is under a great mistake. Instead of discussing the question again, I refer to my opinion in the case last cited. It may not be amiss here to suggest to counsel, that when dissatisfied with decisions of this court, the proper course is to raise the points at the trial and take exceptions, and then carry the questions to the court of errors, instead of arguing the same points over again in this court upon a case. It is insisted that the course attempted in this case shows the absence of malice. That I deny. It must be admitted that the speaking the words is evidence of malice. A justification does not disprove malice, but confirms it. In such case, the plaintiff fails; not because of the absence of malice in the defendant, but because the plaintiff has sustained no damage. Notice of justification, put upon the record, is evidence conclusive of malice. If a notice that a defendant intends to prove the truth is evidence of malice, the offer of evidence tending towards proof can not show the absence of malice.

The last ground upon which the defendant asks for a new trial is, that the verdict is against law and evidence. From the remarks already made, it is clear that the verdict is according to law as it is understood in this state, and it is well supported by the evidence.

A new trial is therefore denied.

TO MITIGATE DAMAGES IN SLANDER, evidence is inadmissible that tends to establish the truth of the charge: *Cooper v. Barber*, 24 Wend. 106; *Bush v. Prosser*, 11 N. Y. 350; S. C., 13 Barb. 223; *Snyder v. Andrews*, 6 Id. 57; *Hager v. Tibbits*, 2 Abb. N. S. 100; *Regnier v. Cabot*, 2 Gilm. 40; *Thompson v. Bowers*, 1 Dougl. 327; in each of which the principal case is cited; *Gilman v. Lowell*, 24 Am. Dec. 96, in the note to which the cases appearing in this series are collected. In mitigation of damages in slander the defendant may give evidence of the plaintiff's general bad character, but not of particular facts tending to impeach his character, nor is such evidence confined to the plaintiff's character in respect to the matters charged in the slander: *Lamos v. Snell*, 25 Id. 468.

ALL THE ACTIONABLE WORDS LAID IN A DECLARATION IN SLANDER need not be proved, to avoid a nonsuit; it is enough that some actionable words are proved: *Clark v. Munsell*, 6 Metc. 387.

MASONS AS JURORS.—On the competency of masons to act as jurors, this case is referred to and distinguished from the case then before the court, turning upon objections made to jurors by reason of their membership in a political organization, in *People v. Reyes*, 5 Cal. 350.

## LAMB v. LATHROP.

[13 WENDELL, 95.]

A TENDER PROPERLY MADE IS A SATISFACTION OF THE DEMAND; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense.

IDEM—THE RELATION OF DEBTOR AND CREDITOR NO LONGER EXISTS between the parties, but that of trustee and *cestui que trust*, or bailor and bailee.

PLEA OF TENDER OF PERSONALTY NEED NOT AVER that the defendant is still ready to deliver; nor that the tender was made in satisfaction of the debt.

WHERE PROPERTY HAS BEEN TENDERED as of a certain value, having been appraised by but one of the two appraisers agreed upon by the parties, the tender is not good; both appraisers must act, or the amount in money tendered.

PROPERTY OF A GREATER VALUE THAN THE DEBT can not be tendered with a demand for the difference; it should be tendered at the amount to be paid; or money should be tendered.

DEMURRER to a replication. The plaintiff declared on a note whereby the defendant promised to pay the plaintiff fifty dollars in a horse, neat stock, or in first-rate pine lumber, at the market price, at the appraisal of two persons, Bartlett and Rowley. Plea, tender, on the day of the maturity, of a horse appraised by Bartlett at the value of seventy dollars, and averring Rowley was not in the state, and could not unite in the appraisal. The plea did not contain the averment of *tout temps prist*. Reply, a subsequent demand for the horse, and



refusal of defendant to deliver unless he should be paid sixteen dollars and fifty cents, the difference in value. Demurrer.

*J. A. Spencer*, for the defendants.

*M. T. Reynolds*, *contra*.

By Court, SAVAGE, C. J. The principal question arises upon the plea of the defendants, the validity of which is denied by the plaintiff, and the first ground urged on his part is, that it is not averred that the defendant is still ready to deliver the horse. It is contended, on the authority of Chipman's Essay on Contracts, 96, that such an averment is necessary; and that, in a case like this, the replication of a subsequent demand and refusal authorizes a recovery upon the original cause of action. The learned author of this essay argues that as there is at this day no case where property is lost to the creditor by a tender and refusal, it follows that every plea of tender must contain an averment that the property is still ready. It is true that property tendered is not lost to the creditor by his neglect or refusal to receive it; but it is also true that, in the case of a tender of specific articles, the courts in this state consider the contract to deliver or pay such articles discharged. The tender, properly made, is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. In the case of *Slingerland v. Morse*, 8 Johns. 478, the court say: "We consider it (the tender) a complete bar to the suit upon the contract." In *Sheldon v. Skinner*, 4 Wend. 528, 529 [21 Am. Dec. 161], this subject was again considered by this court, and such a tender held analogous, as it was in the last case cited, to the French consignment, whereby the debtor is discharged. The creditor must resort to the specific articles, and to the person who tendered them as the bailee thereof. The relation of debtor and creditor no longer subsists between these parties, but that of trustee and *cestui que trust*, or bailor and bailee: See 2 Kent Com. 508, 509, and cases there cited. If such be the law, the defendant in this case was not bound to aver that the horse was still ready; and the plea is not faulty for want of such averment.

The remaining objections to this plea are, that it is not averred that the appraisal was by the persons agreed upon, nor at the market price, nor that the tender was made in satisfaction of the debt. No authority is cited to show that it should be averred that the offer was made in satisfaction of the debt;

the precedents are not so, nor do I see any necessity for such an averment.

The plaintiff complains that the defendant did not pay him fifty dollars and interest in a horse, according to his contract. The defendant says, that on the day, and at the place appointed, he tendered to him the said sum in a horse, according to his contract; that is enough. Nor can it be necessary in such case to aver that the appraisement was at the market price. The market price is the price of every article, unless some other is mentioned. The market price, I apprehend, was inserted as directory to the appraisers, and the averment that the horse was appraised by the appraisers is sufficiently minute and certain; to appraise at any other price would be a violation of duty, even if the words "market price" were omitted. The presumption in such cases is, that the persons designated have done their duty; not that they have violated it.

But the objection that there is no averment that the property in question was appraised by the persons agreed upon is not so easily obviated. The defendants, by their contract, agreed to pay fifty dollars and interest for one year, in a horse, at the appraisal of Bartlet and Rowley. They aver that they tendered the horse at the appraisal of Bartlet; that is not a compliance with the contract. The appraisement by two persons is a condition precedent to the tender; the plaintiff has not agreed to accept a horse at the appraisement of Bartlet alone, nor of Bartlet and any other except Rowley. It is not sufficient that the act done may be equivalent. The plaintiff relied upon the judgment of those particular persons; the defendants undertook to procure it: if they have failed, they must pay the money. There is a debt due the plaintiff; he agrees to receive a horse, provided it is appraised by Bartlet and Rowley. The defendants agree to pay the money if they do not deliver a horse at the appraisal of Bartlet and Rowley. This is the legal effect of the contract. It is manifest that the defendants have not procured the appraisal of the two persons named; and as they have not performed the condition upon which they were to be excused from the payment of the money, it follows that the money must be paid. It is not for the defendants to say that they can make a new agreement for the plaintiff; nor can the court do it. The plaintiff has substantially said, I will not agree to take a horse at all unless at the appraisal of these two men. I will not take the appraisal of one of them, but of both. The defendants entered voluntarily into the agreement, and

they must perform it. This case appears to me to be analogous to the cases upon fire policies, where, if the certificate of certain persons is required, no other can be substituted: 6 T. R. 719; 1 H. Bl. 254; 2 Id. 574. This view of the subject is sufficient to authorize a judgment in favor of the plaintiff.

It is not improper to remark, that the plea is defective in another particular, though the point is made here as an objection to the replication. The horse, it seems, was appraised at seventy dollars, and the defendant claims the payment of the difference in money, before he is liable to deliver the horse. Under what agreement of the plaintiff do the defendants set up this claim? The plaintiff hath said that he will receive a horse worth fifty-three dollars, on certain conditions; but it does not follow that he is to receive a horse of a greater value, and pay the difference. He has entered into no such agreement. The defendants must tender the horse according to agreement; if he is of greater value, they must either tender him at the amount to be paid, or keep him, and pay the money.

The plea is bad; and the plaintiff is entitled to judgment, with leave to defendants to amend, on payment of costs.

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TENDER OF SPECIFIC ARTICLES and refusal to accept the same makes the tenderer the bailee of the tenderee: *Gayle v. Suydam*, 24 Wend. 274; *Brooklyn Bank v. De Grauw*, 23 Id. 345; *Hayden v. Demets*, 53 N. Y. 431; *Desarts v. Leggett*, 16 Id. 585; *Billings v. Vanderbeck*, 23 Barb. 554; the property becoming the tenderee's: *Billings v. Vanderbeck*; *Brooklyn Bank v. De Grauw*; and the original contract can thereafter afford no ground of remedy to the party who has refused to accept; he must look to the property, or for its value: *Desarts v. Leggett*; *Gayle v. Suydam*. But these rules do not apply to contracts executory on both sides: *Billings v. Vanderbeck*, 23 Barb. 554; and are different from those that govern in the case of a tender in satisfaction of a money demand: *Simpson v. French*, 25 How. 465. In all of these cases *Lamb v. Lathrop* is cited; and further, in *Gayle v. Suydam*, 24 Wend. 274, where the defendant's agent had tendered the acceptance of a solvent house, but, the note sought to be taken up not being produced, the acceptance was destroyed. Judge Cowen, commenting on this conduct of the tenderer's agent, says: "By an act of destruction or mutilation, he undoes all that he had performed. He becomes a bailee for the tenderee, it is true, and the latter may demand of him the subject of the tender, and, if he withhold it, sue in trover or some other action; and if the thing be not destroyed or mutilated, perhaps this is his only remedy: *Lamb v. Lathrop*, 13 Wend. 95. But if it be destroyed, or its value impaired by the act of the agent, because not accepted, as it was here, this is a wrong which the tenderee, in his election, may treat according to the apparent intent, which is to take back or annul all that has been done. The tenderer, whether the wrong be done by himself or agent, should not be received to gainsay such a construction. The tender must be not only formal, but *bona fide*. The tenderer of a chattel need not, in pleading, say *uncore prist*: *Lamb v. Lathrop*,

*ut sup.*, but it must not appear in evidence that he has willfully rendered the act unavailable. The obligation to keep the tender is not always imperious, as it is where money was tendered. As to chattels, it is said that the debtor may abandon them: 3 Kent, 509, 3d ed. They may be ponderous, their custody troublesome or expensive, and in no case, perhaps, where the tenderer retains them, can more than ordinary care for the keeping them for the tenderer be demanded. The general rule is laid down in *Lamb v. Lathrop*. They are to be kept at the risk of the tenderer."

**TENDER OF PERSONALTY, WHEN VALID.**—This subject is considered in the note to *Bates v. Bates*, 12 Am. Dec. 573; and in *Roberts v. Beatty*, 21 Id. 410; *Sheldon v. Skinner*, 21 Id. 161; *La Farge v. Rickert*, Id. 209, with respect to the time and place of the tender; and in the note to *Barney v. Bliss*, Id. 700 and in *Mitchell v. Merrill*, 18 Id. 128, in respect to what is a tender, its effect and the subsequent relations of the parties thereto as to the articles tendered. In these notes, cases are collected showing that the doctrines of the principal case are in harmony with the weight of authority. It is also decided in *Sheldon v. Skinner*, 21 Id. 161, that although a tender of chattels in pursuance of a contract for their delivery discharges the original obligation, and, if not accepted, converts the obligor into the bailee of the obligee, yet it does not justify the obligor in abandoning or destroying the property; but that he must take care of it at the expense and risk of the obligee. Where the tender is made after a breach of a contract to deliver goods, an objection on that ground is waived, if a refusal to accept is based solely on the ground of their being unmerchantable: *Gould v. Banks*, 24 Id. 91. A tender of chattels on Sunday is valid both at common law and under the statute: *Amis v. Kyle*, Id. 463.

CASES  
IN THE  
COURT FOR THE CORRECTION OF  
ERRORS  
OF  
NEW YORK.

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ONTARIO BANK *v.* LIGHTBODY.

[13 WENDELL, 101.]

**THE BILLS OF AN INSOLVENT BANK** are not satisfaction of a debt, although they are current at the place where they were given, neither party knowing of the insolvency.

**ERROR.** Lightbody sued the bank to recover the difference between the face value of a bill of the Franklin Bank and the amount realized thereon, the bill having been given to Lightbody at Utica, when he presented his check to the bank, where he had money on deposit in excess of the amount of the check. The bill, being for five hundred dollars, was given as a portion of the money drawn from the bank. Three days before the transaction, the Franklin Bank, being in New York, had failed; but news thereof did not reach Utica until the day after the transaction. The Ontario Bank acted in good faith, not knowing of the insolvency of the Franklin Bank. Lightbody received two dividends, amounting to thirty-three per cent. on the bill. The jury returned a special verdict. Judgment for the plaintiff.

*C. P. Kirkland*, for the plaintiffs in error.

*J. A. Spencer*, contra.

By **CHANCELLOR.** The question to be decided is, which of the parties shall sustain the loss in reference to the bill of the Franklin Bank, received by Lightbody, paid upon the presentment of his check. The law is well settled, that where the note of a third person is received in payment of an antecedent

debt, the risk of his insolvency is upon the party from whom the note is received, unless there is an agreement or understanding between the parties, either express or implied, that the party who receives the note is to take it at his own risk. The same principle is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties, that if the bill, at the time it is received, is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the bank. This implied agreement between the parties arises from the fact that bills of this description, so long as the bank which issued them continues to redeem them in specie at its counter, are by common consent treated as money, and are constantly passed from hand to hand as such. The receiving them as money, however, is not a legal, but only a conventional regulation, adopted by the common consent of the community; as no state is authorized to coin money, or to pass any law by which anything but gold or silver coin shall be made a legal tender in the payments of debts. This principle of considering bank bills as money, which the receiver is to take at his own risk, can not therefore be carried any further than the conventional regulation extends—that is, to consider and treat them as money so long as the bank by which they are issued continues to redeem them in specie, and no longer. When, therefore, a bank stops payment, its bills cease to be a conventional representative of the legal currency of the country, whether the holder is aware of that fact or not; from that moment the bills of such bank resume their natural and legal character of promissory notes, or mere securities for the payment of money; and if they are afterwards passed off to an individual who is equally ignorant of the failure of the bank, there is no agreement on his part, either express or implied, that he shall sustain the loss which has already occurred to the original holder of the bills.

Upon the principles applicable to cases of mutual mistake, as those principles are administered in courts of equity, it is now settled that, if an individual passes to another a counterfeit bill, or an adulterated coin, both parties supposing it genuine at the time it was received, the one who passes it is bound to take it back and give him to whom it was passed a genuine bill or an unadulterated coin in lieu thereof, or, in other words, to make good the loss: *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446]. That principle of natural justice is equally applicable to the case under consideration. The actual loss had

been sustained by the failure of the bank while the plaintiffs in error were the holders and owners of the bill; and it is a maxim of the law that the loss is to him who was the owner at the time such loss happened, if both parties were ignorant of the loss at the time of making their contract. Here the one party intended to pay, and the other supposed he was receiving the bill of a bank which was redeeming its bills at its counter. Suppose the inquiry had been made of the defendant: "Do you expect to sustain the loss if the bank should fail before you shall have parted with this bill?" The answer, according to the implied understanding of the parties, arising from the nature of the transaction, and considering the bills of specie-paying banks as money, would certainly have been the affirmative. But if he had been asked, "Do you understand that you are to bear the loss, if it should hereafter be ascertained that the Franklin bank has now actually failed and stopped payment?" he would unquestionably have answered: "No; in that event, as the loss would have happened while you was the owner of the bill, natural equity requires that you should bear it; and I shall expect you to take back the bill and give me one which is good."

The principle adopted by the supreme court in this case, is also the only one which can protect the honest and unsuspecting against the frauds of those who might be disposed to take advantage of the ignorance of others as to the failure of a banking institution. A person who has heard of the failure of a bank while he has some of its bills on hand, will naturally be tempted to get rid of them, for the purpose of avoiding a loss he might otherwise sustain; and if he was disposed to be a rogue, he would keep his knowledge of the failure to himself, until he could pay out his bills to those who were ignorant of the fact, and in such case he would escape with impunity, if those to whom he passed them were required to prove that he was aware of the failure at the time they received the bills from him. And even if the first person to whom a bill was passed, should be so fortunate as to obtain proof to establish the fraud, if he had honestly parted with the bill while he was yet ignorant of the fact, so that the one who had received it from him could not call for repayment, the original holder of the bill, who was guilty of the fraud, would still escape with impunity. On the whole, I am satisfied with the judgment of the supreme court in this case; not only as perfectly legal and just, but also as that which is most consistent with the substantial interests of

the community, and founded upon a correct principle of public policy.

VAN SCHAIK, Senator. A powerful effort was made by the counsel for the plaintiffs in error, and many authorities were cited to prove that bank notes have been treated and viewed as money, both in this country and in England; and he argued that payment in good faith, in bills current at the time and place of the transaction, constituted a full discharge of the obligation of a debtor to his creditor, even though, as in the present case, the bank, in the bills of which the payment was made, had failed previous to the making of the payment.

The authorities adduced by the the counsel were misapplied; and I consider it a full answer to the argument, which was founded upon them, to say that there is no adjudged case in the books to authorize the inference that bank notes have ever been considered as money, except under the universally implied understanding that the banks which issued the paper were able to redeem or to substitute a full equivalent for their issues; and therefore it is not a sound inference from the cases to say that the paper of a bank shall be entitled to the same consideration as money, after the bank has failed, that it had before, in consequence of the confidence in its stability. To test this position, it will be sufficient to select a few of the strongest cases. *Miller v. Race*, 1 Burr. 452, was the case of a bank note stolen from the mail, and which fell into the hands of the defendant, an innkeeper, honestly, in the course of his business. The court decided that the action would lie upon the general course of business, and the consequences to trade and commerce, which would be much incommoded by a contrary decision. Lord Mansfield, in that case, says that bank notes ought not to be compared to what they do not resemble—goods, securities, or documents for debts; that they are treated as money, as cash, by the general consent of mankind. “They are as much money as guineas themselves are, or any other current coin.” The importance attached to the influence of the decision in this case upon trade and commerce is evidently overrated. The equity of the case itself is on the side of the party who last gave, in the pursuit of an honest calling, a valuable consideration for the money. Circumstances might change this; but, generally speaking, traders and others can not be upon their guard to learn whether the sums of money they receive, suitable to the extent of their business, are stolen or found. But the case itself, and the character given by Lord Mansfield to bank



notes as money, assumes the fact of the unquestioned solvency of the maker of the note. This is all-important, for there is a vastly wider difference between the note of an insolvent and that of a solvent bank, than there is between a good note and an equal amount in guineas. In the case of *The Bank of the United States v. The Bank of the State of Georgia*, 10 Wheat. 333, notes issued by the bank of Georgia had been altered so as to increase the amount of the promise to pay from five hundred and ninety dollars to five thousand nine hundred dollars. Having been received in the bank of the United States, they were, in the ordinary course of their exchanges, remitted to the bank of Georgia, which received them as genuine, but subsequently discovering the alterations, offered to return them. The tender to return the notes was not made until nineteen days after their receipt. The case came before the supreme court of the United States upon a writ of error from the circuit court of Georgia. The supreme court reversed the judgment of the court below upon two points: 1. Because the circuit court had refused to instruct the jury, that if they believed the evidence, the plaintiffs were entitled to recover the balance due by their customer's book. 2. That the plaintiffs were entitled to interest from the commencement of the action. Mr. Justice Story, who delivered the opinion of the court, did not consider that this was a case of a special deposit, but the notes were paid as money upon general account, so that, according to the course of business and the understanding between the parties, the identical notes were not to be restored, but an equal amount in cash was to be paid; that the notes passed into the general funds of the bank of Georgia, and became its property. Upon this ground, the action as to form was maintained. But in going into the merits, great stress was laid by the court upon the fact that these were not the notes of another bank, or the security of a third person, but were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner; and the whole general reasoning of the case, separate from the principles of other cases which are brought to sustain collateral points, goes upon the broad ground that a bank is bound to know its own paper. This position is laid down with so much emphasis, that it must be considered as the controlling reason for the judgment of the court. How the question of a special deposit would have been treated by the court, if the paper had been the altered notes of the United States bank itself, or of any other bank, can not now be known; neither does the case

reach the question of the notes of a third bank, being at the time of the exchange or deposit, an insolvent institution.

In 1 Ld. Raym. 738, it was held, an action did not lie against the assignee of a bank bill, because he had it for a valuable consideration; and it always is an inquiry whether the bearer came fairly by it. None of the cases proceed exclusively upon the mere similitude between bank money and cash, and the answer is the same to all the cases which hold bank paper equal to money, as it must be to that in which Lord Mansfield declares that bank notes are as much money as guineas are—that is, that the judges always allude to genuine and solvent notes. There are some individual opinions of judges, however, which appear to militate against this position. In the case of *Young v. Adams*, 6 Mass. 182, a payee recovered against a payor, the amount of a five-dollar counterfeit bill which had been given him with other money. It is impossible to find in this case anything to support the doctrine that a payment made in the bills of an insolvent bank is valid. Yet the judge says, argumentatively, in a supposed case, “When the bills paid are true and genuine, the responsibility of the bank is, we believe, at the risk of the receiver.” But it is admitted that this construction goes “farther in favor of the currency of bank notes or bills, than the authorities warrant in regard to private notes or bills, or even bankers’ notes in England when accepted in payment.” But the suggestion is afterwards qualified in the following manner: “Private notes, that is, of individuals or companies, whether incorporated or not, where the currency of them is not regulated by some notorious and peculiar usage, when accepted in payment or discharge of an existing contract, are taken at the risk of the payor.” And the converse of this proposition must be, that such notes as are regulated by notorious and peculiar usage are at the risk of the payee. But if this proposition were the foundation of a case to be decided, it is not certain that this would be a satisfactory view of the question, since between the circulation and appreciation of public bank notes, issued by different institutions, there is as great a difference as between public bank notes as such, and private notes, whether of private banks or individuals.

To say, because the community has become by habit inspired with confidence in the trustworthiness of banks and bank paper, that therefore a payment made in the paper of a broken bank, not knowing it to be broken, discharges the debt, is a principle not discoverable in any system of ethics or jurispru-

dence. Policy may be deemed to require that bank circulation should be protected by a leaning in support of its reputation with the public; but it is unnecessary. If worthy, it will stand without the aid of legal decisions, which tend to pervert the right, and which some judges believe give a dangerous facility to bank circulation. The convenience of a bank, and the honesty of its administration, are its safeguards. When these are withdrawn, law can render to its circulation no effectual aid.

In ordinary use, and for many legal purposes, as in a bequest in a will or when bills are taken on execution, bank notes are deemed and taken to be money; but after the payor has become insolvent, they can be so considered only for the purpose of identification. In real payments they must possess money's worth. Not having that intrinsically, it is to be sought for in the ability of the issuer to redeem his paper. The strict legal definite character given to bank paper by our laws is, that of promises to pay and evidences of debt, and this is at least consistent with the reality; and when so considered, the case stands in a new light. When a bank issues a note or bill, it creates a debt. By law, this debt must be paid in specie, if it be demanded. Into the engagement thus to pay, every bank necessarily enters, when it receives its charter. By the terms of this agreement, neither party regards bank paper as money. The circulation of its bills is derived from its credit; and its credit is the concomitant of its acknowledged and permanent solvency. Its bills circulate like coined metal, so long as their representative character remains unimpaired; but a bank bill is not money, according to the understanding between the parties, any more than it is money according to the signification of that word. It is admitted that bank notes, as the circulating medium of the country, have acquired the denomination of money, from their convenience as a substitute for gold and silver, and their utility in promoting the objects of trade, and in exchanging the products of industry; but after a bank has failed, its notes are deprived of those characteristics of money which entitled them to that appellation by the custom of trade, while they continued at a value equivalent with specie, or nearly so. Their convertibility into specie being lost, and their power of circulation having departed, not one of the ingredients of money remains, and they can be legally defined only as unpaid promissory notes.

But it may be well to show more particularly that our statutes do not yield to bank notes the character of money, even

while they circulate. In the act concerning "moneyed corporations," 1 Rev. Stat. 589, sec. 1, they are called notes or other evidences of debt. In the session laws of 1830, c. 243, sec. 1, page 265, the designation is still more explicit: "Notes, bills, or other evidence of debt, purporting to be a bank note."

In the acts incorporating banks, their appellation is evidence of debt; and when mentioned in connection with bonds and promissory notes, they are not distinguished as money, but are regarded in the light of promises to pay. Besides, the inherent qualities and appropriate characteristics of all bank paper, are those which belong to promissory notes, "or documents for debts," and so I think we must consider them for the purpose of this adjudication. If bank notes be considered as mere promissory notes, then the rule to be applied to this case is, that "paper is no payment of a precedent debt; it is always taken under the condition to be payment if the money be paid in convenient time:" *Ward v. Evans*, 2 Ld. Raym. 928. This is the settled law, and the custom of trade in this country, "unless the party make it his own by agreement, or by the act of negotiating it." The cases of *Puckford v. Maxwell*, 6 T. R. 52, and *Owenson v. Morse*, 7 Id. 64, were decided upon modifications of this rule. The paper possessing no value at the time the contract was made, and there being no agreement that the party was to take it at his own risk, was held to be a nullity, and the party might act as if no such bill had been given. In *Markle v. Hatfield*, 2 Johns. 455 [3 Am. Dec. 446], the same principle prevailed; the party did not receive the compensation intended: it was a forged bank note. In *Johnson v. Weed*, 9 Johns. 311 [6 Am. Dec. 279], the court says: "The books all agree, that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment if it afterwards turns out to be of no value." The fact of an agreement is matter for the jury.

Owing to the extraordinary aptitude of the people of this country for business and trade, to the immense amount of our resources, which the application of industry and science are developing with constantly accumulating benefits to the community, and which require the indispensable aid of capital to bring them to market—and to the nearly total absence of specie in large districts of country—paper money has been rendered the common medium of the exchanges of property or of barter, to a greater extent among us than in any other nation on the globe. Its great convenience and the hitherto indispensable

necessity for its use have created the idea, that it should be clothed with the attributes of real money; and this opinion necessarily gains ground among the undiscerning; but it ought not to be permitted to subvert the established principles of moral justice. When a citizen sells an article for cash, he is entitled to demand for it, not false, or spurious, or insolvent, but good money, whether it be in coin or bills; and when a man pays a debt, the medium of payment must turn out to be what he represented it to be at the time of payment. The preceding view of the subject demonstrates that the understanding that bank notes shall pass current as cash is entirely conventional, and can not be traced to an original principle; but the understanding that money shall be good at the time of payment is an original and always subsisting part of the agreement; it goes to the root of every contract; it relates to its essence and substance; and, in strict morals, this consideration must take precedence of every other implication that may arise upon a bargain for money, or in the payment of a debt. In the case before the court, the bill was not at the time what the receiver supposed it to be. The tacit agreement and understanding between the parties was, what the universal understanding is in every traffic for money; that the paper is good at the time of passing; and this is a previously existing and more important understanding than that it circulates as money.

Mr. Gallatin, in his essay on the Currency and Banking of the United States, page 29, says: "A payment made in bank notes is a discharge of the debt, the creditor having no recourse against the person from whom he has received the notes, unless the bank had previously failed." This sagacious statesman did not fail to perceive that the inherent defects of paper money rendered it impossible to make it fulfill at all times the offices of real money, and that in the event of the failure of the bank, a question of equity might arise between innocent parties to the transfer and acceptance of these notes. He does not merely reserve the point, but expresses a decided opinion, without appearing to apprehend that the currency of paper money will be retarded by the promulgation of an incontrovertible position. The principle adopted by Mr. Gallatin is founded upon common usage and general consent, by which every person receives bank money which has become current, under the implied understanding that it is good and the bank solvent. If a bank has failed before the transfer of its notes from one person to another, the primary condition of the contract has

been touched in its vital part; the understanding is not fulfilled; the contract is a nullity. The want of knowledge at Utica of the failure of the bank of New York can not be permitted to remove the consequences that ensued immediately upon the failure. The money must be lost in the hands of him who held it when the bank failed. On great moral and public considerations, I can have no hesitation in deciding the case upon this principle, and especially as it will have a tendency to prevent attempts which have frequently been made to commit frauds by the circulation of insolvent bank paper.

There was no default in the party who received bad money for good. He transmitted the note immediately to New York, and upon its return offered it to the bank, but it was refused.

I am therefore of opinion that the judgment of the supreme court ought to be affirmed.

On the question being put, Shall this judgment be reversed? all the members of the court present, twenty in number, with one exception voted in the negative. So the judgment of the supreme court was affirmed.

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PAYMENT IN BILLS OF INSOLVENT BANK.—Two lines of decisions have been made by the courts of this country upon the effect of a payment in bills of a bank insolvent at the time, but not known to be so by either party. One set is represented by *Ontario Bank v. Lightbody*, the leading case supporting the one view, and the other set is represented by *Bayard v. Shunk*, 1 W. & S. 92, the leading case maintaining the opposite position. The diversity of opinion arises out of the construction placed upon bank bills, whether or not they are regarded as cash. The principal case, and those which follow it, regard the bills of a bank in the light of promissory notes, and as subject to the rules applicable to such instruments; on the other hand, the theory of the Pennsylvania case and those like it is, that such bills are paid and received as cash. From these two views have arisen the doctrines that if a creditor takes bank bills of a bank insolvent at the time, but not known by either party to be so, it is no discharge of the debt, the doctrine of the principal case; and, that the receiving of bank bills under such circumstances is a discharge of the debt, the doctrine of *Bayard v. Shunk*. Nor is this diversity of opinion confined to the adjudicated cases; text-writers differ and take sides upon the question. No very recent decision has been found; and most of the cases, which are but few, have been collated by text-writers who have considered the subject of bills and notes. Illinois, *Magee v. Carmack*, 13 Ill. 289; Maine, *Frontier Bank v. Morse*, 22 Me. 88; New Hampshire, *Fogg v. Sawyer*, 9 N. H. 365; Ohio, *Westfall v. Braley*, 10 Ohio St. 188; South Carolina, *Harley v. Thornton*, 2 Hill, 509; Vermont, *Wainwright v. Webster*, 11 Vt. 576; *Gilman v. Peck*, Id. 516; and Wisconsin, *Townsend v. Bank of Racine*, 7 Wis. 185, have adopted the New York view, and hold it to be no payment to give the bills of an insolvent bank, although believed to be solvent. On the other hand, Alabama, *Lowrey v. Murrell*, 2 Port. 280, *post*; Delaware, *Corbit v. Bank of Smyrna*, 2 Harr. 235; Tennessee, *Ware v. Strut*, 2

Head, 609; and Virginia, *Edmunds v. Digges*, 1 Gratt. 359, maintain the position taken by C. J. Gibson in the Pennsylvania decision above referred to. In England, *Timmins v. Gibbins*, 18 Q. B. 722, and by Story on Prom. Notes, sec. 389, the former doctrine is held, while Daniel, 2 N. G. Inst., sec. 1677, favors the latter ruling.

Chief Justice Gibson, 1 W. & S. 92, after stating a few general principles in regard to bills of exchange or promissory notes as payment, says: "But by the conventional rules of business, a transfer of bank notes, though they are of the same mold and obligation betwixt the original parties, is regulated by peculiar principles, and stands on a different footing. They are lent by the bank as cash; they are paid away as cash; and the language of Lord Mansfield in *Miller v. Race* was not too strong when he said: 'They are not goods, nor securities, nor documents for debts; but they are treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in common payments as money or cash.' If such were their legal character in England, where there was but one bank, how emphatically must it be here, where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. \* \* \* The weight of authority bearing directly on the point, is decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt." His honor then turns to the consideration of the principal case, and examining the arguments employed by the judges therein, continues:

"The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of the whole communities at their nominal value when notoriously below it. But why hold the payor responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of a mortal disease in him might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the mean time; or it may stop at the instant of presentation when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, and is perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure evinced by stopping before the time of the transaction or after it is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a

bank note as an ordinary promissory note would introduce endless confusions and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers, would more than counterbalance the good to be done by hindering a crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones."

In the principal case, it was said that the principle applicable where one passes a counterfeit bill or an adulterated coin to another, both parties supposing it genuine when passed, is also applicable to the transfer of the bills of an insolvent bank. But Justice Gibson repudiates this similarity. He says, proceeding: "The case of a counterfeit bank note is entirely different [from the note of an insolvent bank]. The laws of trade extend to it only to prohibit the circulation of it. They leave it in all beside to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential existence: 2 Kent, 468; and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a dead horse is a living one; and it is an elementary principle that what has no existence can not be the subject of a contract. But it can not be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undisolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its noteholders and depositors; and even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel."

When Chief Justice Gibson says that bank notes are, by the "conventional rules of business" regarded as cash, it is the same as saying that bank notes are cash because parties agree to receive them as such, and that the mere fact of the reception of such notes is evidence of such agreement. In other words, bank bills are considered as discharging the debt for which they are given, because the parties are presumed to consider them as payment. Should a creditor expressly engage to receive bank bills in payment of a debt, there is little doubt that the loss by the then insolvency of the bank would fall upon him. And Chief Justice Gibson's doctrine amounts to holding the mere receiving bills of a bank in the course of mercantile transactions as equivalent to an express engagement to take them in payment, in discharge of any obligation. It is right here that the New York court differs from the Pennsylvania jurist. They do not consider the mere taking of the bank bills evidence of an agreement to receive them in payment, nor that the general use of such bills has created any ground for such a presumption. It is this vexed point in respect to the understanding of the parties to the transaction, that leads the annotator of Story on Prom. Notes, sec. 389, to say: "After all, the point seems to resolve itself more into a question of fact as to the intent than as to law; and it must and ought to turn upon this,



whether, taking all the circumstances together, the bill was taken as absolute payment by the holder at his own risk or only as conditional payment, he using due diligence to demand and collect it." "But," says Mr. Bigelow in the note to the principal case in his work on Bills and Notes, p. 671, 2d ed., "it may be questioned if this reaches the difficulty. The real question in cases like *Bayard v. Shunk*, is, what is the presumption of law in the absence of evidence upon the question of present solvency when the paper is given for cash as a payment of property? If the paper itself is to be treated as a commodity, as property, and not as merely the representative thereof, then the Pennsylvania court appear to be right in applying the doctrine of *caveat emptor* to the transaction. If, on the other hand, it is only the symbol of property, if the purchaser acquires only a promise to pay money, it may well be doubted whether the maxim of sales should apply.

"The rule of *caveat emptor*, though well established (within limits) in the case of sales of goods, does not sufficiently commend itself to favor to justify an extension of it to cases not strictly falling within its admitted application. Nor should the fact of hardship to the vendor be permitted to enter into the consideration of a case in which the purchaser is in no way responsible for that which brings upon him that result. If the vendor loses his money, he loses it because of a fact anterior to the purchase by the plaintiff—a fact which existed while the paper was in the vendor's hands. The vendor had already lost; the paper was good for nothing to him. Nor does the fact that he supposed it to be good justify him in keeping the money or property received, which could only have been given for it by the purchaser upon the same supposition that it was good. There has been a failure of consideration: See *Timmins v. Gibbins*, 13 Q. B. 722, 725, Lord Campbell. This suggestion, however, will give way before any evidence tending to show that the purchaser in fact undertook to purchase at his own risk."

Where the view obtains that the loss by the insolvency of the bank shall fall on the transferrer, both parties being equally ignorant of the failure, it is a qualification of the rule, that the transferee should within a reasonable time after the discovery of the condition of the bank, return, or offer to return, the notes to the transferrer: *Camidge v. Allenby*, 6 Barn. & Cress. 373; 2 Daniel Neg. Inst., sec. 1679; *Frontier Bank v. Morse*, 22 Me. 88. In *Fogg v. Sawyer*, 9 N. H. 365; *Westfall v. Braley*, 10 Ohio St. 188, and *Frontier Bank v. Morse*, it appeared that reasonable diligence had been used by the creditor to return the worthless bills, so that it became unnecessary for the court to decide what would have been the effect of an absence of such diligence. It was said, however, in *Townsend v. Bank of Racine*, 7 Wis. 185, that the failure to return or offer to return the bills, would probably, under any circumstances, only affect the measure of damages. And in *Frontier Bank v. Morse*, it was held that a presentment of the bills to the insolvent bank was not necessary in order to charge the one from whom they were obtained.

TO NOTES OF INSOLVENT INDIVIDUALS given for debts, the principles of *Ontario Bank v. Lightbody* have been applied. In *Benedict v. Field*, 16 N. Y. 695; S. C., 4 Duer, 154, 162, one contracted to deliver goods sold on payment on the notes of a third person, who, between the time of the making this engagement and the date of the delivery, became insolvent. The vendee sought to impose the worthless note of the third person upon the vendor, but the court said that the principal case, "as a decision of the court of last resort, may be truly said to establish the law which it declares," and that if one could return a note received in ignorance of the maker's insolvency, *a fortiori* could he refuse to accept it. *Roberts v. Fisher*, 43 N. Y. 680; S. C., 3 Am.

Rep. 680, carries the doctrine to its extreme limit, and it is doubtful whether that case can be supported in the length to which it has gone. For goods sold, the notes of a third person were agreed to be taken in payment. That person was then insolvent, although not known by the parties to be so. Notwithstanding the fact that the vendor expressly accepted the notes in payment, the court decided that "upon broad principles of justice a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good." It was nevertheless intimated, that had the creditor taken the notes in payment, the maker "failing or not failing," the decision might have been otherwise, thus overthrowing the broad principle upon which the case was decided.

NOTE GIVEN BY DEBTOR OR THIRD PERSON OPERATES AS PAYMENT, WHEN. *Pateshall v. Aphorp*, 1 Am. Dec. 3 and note; *Murray v. Gouverneur*, Id. 177; *Aphorp v. Shepard*, Id. 6; *Holmes v. De Camp*, 3 Id. 293; *Thacher v. Dinmore*, 4 Id. 61 and note; *Manely v. McGee*, Id. 105; *Tobey v. Barber*, Id. 326; *Whitbeck v. Van Ness*, 6 Id. 383; *Johnson v. Weed*, Id. 279; *Wright v. Crockery Ware Co.*, 8 Id. 68 and note; *Barrelli v. Brown*, 10 Id. 683 and note; *Varner v. Nobleborough*, 11 Id. 48 and note; *Ankeny v. Pierce*, 12 Id. 174 and note; *Muldon v. Whitlock*, 13 Id. 533 and note; *Patapasco Ins. Co. v. Smith*, 14 Id. 268; *Hart v. Boller*, 16 Id. 536 and note; *Clopper v. Union Bank*, Id. 294; *Ainslie v. Wilson*, 17 Id. 532 and note; *Reed v. Van Ostrund*, 19 Id. 529 and note; *Glenn v. Smith*, 20 Id. 452 and note; *Hutchins v. Olcott*, 24 Id. 634.

## THE MOHAWK BANK v. BRODERICK.

[13 WENDELL, 133.]

A POSTDATED CHECK is payable at sight, or upon presentment thereof at the bank, at any time on or after the day of its date.

IN PRESENTING A CHECK FOR PAYMENT, reasonable diligence must be used; and what is such diligence must in some measure depend upon the particular circumstances of each case.

THE QUESTION OF REASONABLE DILIGENCE is a mixed question of law and of fact, to be decided by the jury under the direction of the court upon a general verdict, or to be decided by the court, where all the facts and special circumstances of the case are found by a special verdict.

PUTTING A CHECK IN CIRCULATION does not excuse subsequent holders from using diligence in presenting it for payment.

OMITTING TO PRESENT A CHECK for twenty days where the holder and bank are but sixteen miles apart, with daily mail between the towns, releases the payee who negotiated it.

ERROR. Action against the indorsers of a check drawn by one Le Breton, and indorsed to the Mohawk bank at Schenectady, through one Myers, several days before its date, the fourteenth of January, 1830. The check was not sent to the Merchants and Farmers' bank of Albany, on which it was drawn, until the third of February, nor presentment made until the sixth of February. Payment was refused, Le Breton

having stopped payment on the first of February. During January, Le Breton was insolvent, but had no debts falling due except the check. The course of business of the Mohawk bank was to make exchanges with the Albany banks every three weeks, and from January fourteenth to February third, no exchanges were made. A daily mail passed between Schenectady and Albany. Judgment for the defendants.

*A. C. Paige*, for the plaintiffs in error.

*M. T. Reynolds*, *contra*.

By CHANCELLOR. The check in this case was postdated as of the fourteenth of January, although actually drawn and negotiated before that time. Hence it is insisted, in behalf of the defendants, that it must be considered as if it was dated at the time it was actually drawn, and was made payable on a day certain. The court below was right, however, in treating it as a bill or check, payable at sight, or upon the presentment thereof at the bank, at any time on or after the day of its date, but not before; or, in other words, so far as concerns the question of presentment and notice of non-payment, it is to be considered as if drawn, as well as dated, on the fourteenth of January. The drawing of postdated checks is an every day's occurrence in our commercial cities; and I believe the uniform understanding of the parties in such cases is in accordance with the construction which the supreme court has given to the transaction in the present case.

It is not necessary, for the decision of this case, to inquire whether any greater degree of diligence is to be used by the holder of a negotiable check upon a bank, in presenting it for payment, than is required from the holder of a similar draft, at sight, upon an individual. Both are at times made and negotiated for the avowed purpose of a temporary circulation; and when made for such a purpose, I can see no good reason for requiring of the holder any greater degree of diligence in the one case than in the other. The true rule as to both undoubtedly is, that the holder must use reasonable diligence, according to the ordinary course of business in other cases of a like nature; and what is such reasonable diligence must, in some measure, depend upon the particular circumstances of each case. For instance, a person residing in Schenectady gives me his check upon a bank in Albany, in payment of an antecedent debt, or gives me his draft upon an individual residing in the same place, under similar circumstances; I should

not, in either case, be authorized to send the check or bill to my correspondent at New Orleans, to be laid out in the purchase of sugar or cotton, and hold the drawer liable for the solvency of the bank or the drawee of the bill, in the mean time, because that is not the ordinary course of business, and he could not, therefore, have contemplated such a risk; but if I had purchased the check or bill of the drawer, for the purpose of being sent to New Orleans, and to be negotiated there, and with his knowledge, he would then have assumed the risk of the solvency of the drawee, until the check or bill was returned and presented for payment, according to the usual course of trade in such cases. Such I understand to be the effect of the decision of the court of common pleas in England, in the case of *Muilman v. D'Eguino*, 2 H. Bl. 565, which case was principally relied on by the counsel for the plaintiffs in error, for the purpose of showing that a less degree of diligence was required, where a bill had been actually negotiated, than would otherwise have been required. In that case the controversy was between the indorser and the indorsee of five bills of exchange which had not been accepted, the drawers having failed. The bills were drawn in London upon a house in Calcutta, and were indorsed and sold by the defendant in a negotiation upon the royal exchange, to the plaintiffs, as agents for a French house at Paris, that had instructed them to purchase bills on India for the purpose of remittance. The bills had not been sent by the first ship to India, because it became necessary for the plaintiffs to write to their correspondents at Paris, and obtain the necessary instructions as to the persons to whom the bills should be sent at Calcutta; and the bills were actually sent by the first ship that sailed after such instructions were received. It was in reference to the particular circumstances of that case that Chief Justice Eyre remarked, that it would be a serious and difficult thing to say that a person buying a foreign bill in the way that those bills were bought, should be obliged to transmit it by the first opportunity to its place of destination; and that there would also be great difficulty in saying at what time such a bill should be presented for acceptance. It is also in reference to bills which, by the ordinary course of trade, are put in circulation, or which, in a particular case, were made or indorsed for the purpose of being thus used, that Buller, J., remarks that they should be put in circulation to prevent the drawer or indorser from being discharged on account of laches; that if, instead of putting a bill into circulation, the holder were

to lock it up for any length of time, he must be considered as guilty of laches. I do not understand these expressions to mean, that where a check or bill is once put in circulation, it changes its character so as to excuse subsequent holders from the same diligence which would have been requisite if they had been the original payees. It is only meant that each successive holder should either negotiate the bill or check, according to the usual course of business, or should cause it to be presented for acceptance and payment; and that if he did neither the one nor the other, but locked it up for an unreasonable length of time, he would be guilty of laches, which might discharge those who were contingently liable to him as drawers or indorsers.

Most of the difficulties on this subject have arisen from a laudable anxiety on the part of the courts to adopt, in commercial cases, as far as practicable, fixed and certain rules as to what shall be considered reasonable diligence, so that the holders of commercial paper, and those who are contingently responsible for its payment, may be able to understand their several rights and duties in each particular case which may arise. For this purpose they have endeavored to settle, as a question of law, what, from its very nature, must in most cases be a mere question of fact. It however seems to be the settled law in this state, that if there is no dispute about the facts, or when the facts of the case are ascertained, the court is to determine the question whether the holder of a bill has been guilty of laches. This is but saying, in other words, that the question of reasonable diligence is a mixed question of law and fact, to be decided by the jury, under the direction of the court upon a general verdict, or to be decided by the court where all the facts and special circumstances of the case are found by a special verdict.

The question to be decided in this case, therefore, is whether, upon the facts found by this special verdict, it is perfectly clear and evident that there have been laches, on the part of the plaintiffs in error, in the presenting of this check for payment; if so, the judgment of the supreme court is right, and must be affirmed. But on the other hand, if the facts found by the special verdict clearly show that due diligence was used, then the judgment is wrong, and must be reversed; and if the facts found by the jury, in connection with other facts, which the court may reasonably presume to have existed, leave it doubtful whether due diligence has been used, then the special ver-

dict is defective, and the case must be sent back for a new trial.

I think we should lay out of the question, the facts found by the special verdict as to the usual course of exchanges between the Mohawk bank and the banks in the city of Albany, as there is no pretense that this check was drawn or indorsed with a view of its being negotiated or cashed at the Mohawk bank, or that there was any usage of trade from which the defendants had reason to suppose it would be collected through that bank. The check was indorsed by the defendants, and sold to Myers several days before the fourteenth of January, the day on which the bill was dated. On the last mentioned day it was received of Myers as cash by the bank; and though a daily mail ran between Schenectady and Albany, they kept it twenty days before it was sent to Albany; and it was not presented for payment until the sixth of February, six days after the drawer of the check failed, or stopped payment. Upon these facts, I think no court or jury could hesitate in deciding that the holders of this check did not make use of reasonable diligence in presenting it for payment, but, on the contrary, that there had been gross negligence in this respect. Besides, from the facts found by the special verdict, there is reason to believe that the loss of the amount due upon the check might not have occurred, if reasonable diligence had been used in presenting the check for payment.

I therefore am for affirming the judgment of the supreme court.

The court being unanimously of opinion that the judgment of the supreme court ought to be affirmed, it was accordingly affirmed.

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CHECKS, WHEN TO BE PRESENTED.—The law is deemed settled that the holder of a check has the whole of the day after its delivery on which to make a presentment for payment: *Merritt v. Todd*, 23 N. Y. 41, in Judge Hoyt's dissenting opinion; *Syracuse, Binghamton and N. Y. R. R. v. Collins*, 3 Lans. 32; *Smith v. Jones*, 20 Wend. 194; *Harbeck v. Craft*, 4 Duer, 129; *Smith v. Miller*, 6 Robt. 418; *Kelty v. Second Nat. Bank of Erie*, 52 Barb. 334; *Himmelman v. Hotelling*, 40 Cal. 115, in each of which the principal case is cited. This limitation of the time within which the presentment ought to be made, applies to cases where the drawer and drawee reside in the same place. Where they reside in different places, the question of reasonable diligence arises in regard to the presentment, and upon this point also the principal case is referred to: See the citations above, and *Middletown Bank v. Morris*, 28 Barb. 621; *In the Matter of Brown*, 2 Story, 517; *Remer v. Downer*, 23 Wend. 623. But as between the holder and the drawer of a check the degree of diligence required is very much less than in the case of the holder and

an indorser; and in the former case demand at any time before suit would be sufficient, unless it appear that the bank has failed, or the drawer has in some manner sustained injury by the delay: *In the Matter of Brown, supra*; *Harbeck v. Craft, supra*. As to the resemblance between drawing on a bank and on an individual: *Eichelberger v. Finley*, 16 Am. Dec. 312; *Humphries v. Bicknell*, 13 Id. 268; *Cruger v. Armstrong*, 2 Id. 126.

REASONABLE DILIGENCE WHERE THE FACTS ARE ASCERTAINED is a question of law: *Remer v. Downer*, 23 Wend. 623; *Tomlinson v. Rowe*, Hill & Denio, 413, referring to the principal case. The same conclusion is reached, after an examination of many authorities, in the note to *Aymar v. Beers*, 17 Am. Dec. 547.

A POSTDATED CHECK IS PAYABLE on the day of its date: *Sater v. Burt*, 20 Wend. 206; *Bowen v. Newell*, 2 Duer, 598; S. C., 8 N. Y. 195, each citing *Mohawk Bank v. Broderick*.

DEPOSITS IN BANKS.—See the note to *In the Matter of the Franklin Bank*, 19 Am. Dec. 422, for an extended consideration of the rights of depositors in banks.

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## PEOPLE v. ENOCH.

[13 WENDELL, 159.]

WHERE A STATUTE CREATES AN OFFENSE, or changes the nature of one known at the common law, the indictment should be drawn in reference to the provisions of the statute and conclude *contra formam*; but if the statute is only declaratory of the common law, the indictment need not so conclude.

THE OBJECT OF THE REVISED STATUTES RELATIVE TO HOMICIDE was not to create a new offense of murder, but to restore the ancient common law on the subject, and to distinguish between a felonious killing with malice aforethought, and a felonious killing without such malice.

A COMMON LAW INDICTMENT for murder is proper under the revised statutes, but a conviction can not be had of a felonious homicide with malice aforethought, unless the evidence brings the case within the statutory definition.

WHERE THE EXECUTION OF A SENTENCE IS RESPITED until a particular day, the sheriff must then execute the judgment, unless a further respite is granted, or the judgment has been reversed in the mean time; and a *habeas corpus* need not be sued out before the sentence can be executed.

ERROR. Enoch, having been convicted of murder, was sentenced to be executed on the thirty-first of July, 1834. The governor granted a respite until November 14, and in the mean time a writ of error was sued out, removing the record to the supreme court. The indictment charged that the accused, on the twenty-sixth of September, in the year 1833, with force and arms, at, etc., feloniously, willfully, and of his malice aforethought, made an assault upon Nancy Enoch, his wife, and did shoot and discharge a gun loaded with gunpowder and

shot, to and against and upon his wife, and with the shot so discharged from the gun, he feloniously, willfully, and of his malice aforethought, struck, penetrated, and wounded the body of his wife, giving to her with the shot so discharged from the gun, a mortal wound, of which she languished for one hour and then died; and so it was charged that he feloniously, willfully, and of his malice aforethought, did kill and murder his wife, contrary to the statute in such case made and provided, and against the peace of the people, etc. The part of the body struck and the appearance of the wound were described with the usual particularity. The indictment contained three counts substantially alike, except that in the first, the offense was charged to be *contra formam statuti*. The supreme court deciding that the indictment was good, a writ of error was taken out.

*C. B. Moore and J. A. Spencer*, for the convict.

*D. Wager and C. A. Mann*, *contra*, in the supreme court, and *S. B. Strong and Greene C. Bronson*, *attorney-general*, in the court of errors.

By CHANCELLOR. The plaintiff in error has been convicted of the crime of murder, for an offense committed subsequent to the revised statutes; but the conviction is upon an indictment in the usual form, in which indictments for that offense were framed previous to the revision. The important question presented by this writ of error, therefore, is, whether the revised statutes, in which the crime of murder is attempted to be defined and declared, have made it necessary for the public prosecutor to change the common law form of the indictment for an offense of that description.

Where an offense is created by statute, which was not an offense by the common law, it is a general rule that the indictment must charge the offense to have been committed under the circumstances and with the intent mentioned in the statute, which of course contains the only appropriate definition of the crime: *State v. Jones*, 2 Yerg. Tenn. 22; *State v. O'Bannon*, 1 Bayl. Law, 144. But even in that case it is not necessary to pursue the exact words of the statute creating the offense, provided other words are used in the indictment which are equivalent, or words of more extensive signification, and which necessarily include the words used in the statute—as where advisedly is substituted for knowingly, or maliciously for willfully, and the like: *The King v. Fuller*, 1 Bos. & Pul. 180; *United States v. Bach-*



*elder*, 2 Gall. 15. It is otherwise in indictments for common law offenses, where the law has adopted certain technical expressions to define the offense, or to indicate the intention with which it was committed; in which cases the crime must be described, or the intention must be expressed by the technical terms prescribed, and no other. Thus, in an indictment for murder, the terms, murder of his malice aforethought, are considered absolutely necessary in describing the offense; and if these words are left out of the indictment, it will be deemed a case of manslaughter only. In determining the question whether an indictment should be drawn as at the common law, or should appear to be founded upon a statutory provision which is applicable to the offense, the following rules are to be observed: If the statute creates an offense, or declares a common law offense, when committed under particular circumstances, not necessarily included in the original offense, punishable in a different manner from what it would have been without such circumstances; or where the statute changes the nature of the common law offense to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should be drawn in reference to the provisions of the statute creating or charging the nature of the offense, and should conclude against the form of the statute: but if the statute is only declaratory of what was previously an offense at common law, without adding to, or altering the punishment, as was the statute of 25 Edward III., declaring what should be considered and adjudged treason, the indictment need not conclude against the form of the statute: 1 Deac. Crim. Law, 661.

The object of the legislature in adopting the provisions of the revised statutes relative to homicide, in the recent revision of the laws, certainly was not to create a new offense of murder; but the intention undoubtedly was to restore the ancient common law on that subject, as it existed at the time when the common law form of indictment was originally adopted, and to draw a proper line of discrimination, if possible, between the offense which was hereafter to be considered a felonious killing, with malice aforethought, which alone constitutes the crime of murder, and what was to be deemed a felonious killing without such malice. How far they have succeeded as to the last of these objects, may perhaps be considered as a matter of some doubt. But they have unquestionably succeeded in restricting some cases to the grade of manslaughter, which, upon the principles of the common law, never ought to have

been considered or adjudged to be offenses of a higher grade; such as the unintentional killing of a person, by an offender who was engaged in a riot or other offense, that was a mere misdemeanor, and not a felony.

There is another class of cases, referred to on the argument as cases of murder at the common law, which, under the provisions of the revised statutes, must hereafter unquestionably be considered and adjudged to be manslaughter, and not murder. And there is also another and much larger class of cases which hereafter must be deemed murder, by reason of the implied malice that will now attach to the unlawful killing: which cases, before the revision of the statutes, were cases of manslaughter only. The two classes to which I allude depend, however, upon a principle which does not require any change to be made in the common law form of the indictment for murder. Malice was implied in many cases at the common law, where it was evident that the offenders could not have had any intention of destroying human life, merely on the ground that the homicide was committed while the person who did the act was engaged in the commission of some other felony, or in an attempt to perpetrate some offense of that grade. Every felony, by the common law, involved a forfeiture of the lands or goods of the offender, upon a conviction of the offense; and nearly all offenses of that grade were punishable with death, with or without benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony, was, by implication of law, transferred from such offense, to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence. This principle is still retained in the law of homicide; and it necessarily follows, from the principle itself, that as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of killing of a human being, by a person who is engaged in the perpetration of a newly created felony. So, on the other hand, when the legislature abolishes an offense which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely. Such changes in the law of murder have often oc-

curred both in this country and in England; yet it never has before been thought necessary to change the common law form of the indictment to meet cases of this description. The court and jury in such cases immediately apply the common law principle, and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed

Let us then apply these principles to the case now under consideration. The revised statutes having declared that hereafter offenses punishable with death or with imprisonment in the state prison, and such offenses only, shall be deemed felonies, it follows of course, that an accessory to a suicide, or a person who unintentionally kills in an attempt to perpetrate a first offense of petit larceny, could not now be guilty of the common law offense of murder; and therefore the jury could have found him guilty under an indictment like the one now before us. The unintentional killing of a female, in an attempt to produce an abortion, with her own consent, was not in itself murder, although at the common law, if she was quick with child, it formed a very aggravated case of felonious homicide; and it is now made murder in England, by the operation of the statute which makes the destruction of the child a capital felony. It was also murder here, by the operation of the third subdivision of the fifth section of the revised statutes, which attempts to define the crime of murder, until the next legislature, by the amendment of the ninth section of the next title, 2 Rev. Stat. 661, sec. 9; 3 Id., app. 158, sec. 58, made the killing of the mother, as well as the child, a case of manslaughter only. Some other cases of unintentional killing by persons engaged in riots and other misdemeanors below the grade of felonies, which previous to the revision had also been improperly considered as cases of murder, contrary to the principles of the ancient common law, are now restored to that grade of homicide to which they properly belong. All offenses of that description are now placed in the class of homicides committed without malice aforethought; except where the killing is perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, which circumstances now, as at the common law, are sufficient to authorize the jury to find the defendant guilty of killing with malice aforethought: 2 Rev. Stat. 657, sec. 5, sub. 2.

From this examination of the subject, I have arrived at the

conclusion that a common law indictment for murder is proper, under the provisions of the revised statutes. And a defendant can not be convicted on such an indictment of a felonious homicide with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder.

The cases referred to on the argument, from the Pennsylvania and Virginia reports, have no application to the question under consideration, as the statutes of those states have divided murder into two grades, and have provided a way in which the grade of the offense shall be ascertained upon an ordinary indictment, which indictment the legislatures of those states evidently intended should be drawn as at the common law, so as to include both grades of the offense. The only cases I have been able to find in the reports of our sister states, which bear any analogy to that now under consideration, is one in the state of South Carolina, and two others which have arisen in the state of Indiana. In the *Case of Guy Raines*, who was indicted under the statute of South Carolina, to increase the punishment inflicted on persons convicted of murdering slaves, which statute provides, that if any person shall thereafter willfully, maliciously, and deliberately murder any slave within the state, such person on conviction shall suffer death without benefit of clergy, the indictment pursued the words of the statute, and concluded *contra formam statuti*. But Judge Colcock held that the indictment was insufficient. He said that the offense should have been charged in the indictment as at common law; and that all the essential parts of the common law indictment should have been pursued; 3 McC. Law, 543. In the state of Indiana, as I infer from Judge Blackford's reports, they have a statute declaring what shall constitute the crime of murder, and prescribing the punishment of the offense, substantially as at common law, although not in the words of the common law indictment for that offense; and yet the supreme court of that state have twice decided that a common law indictment was sufficient: *Fuller v. The State*, 1 Blackf. 65; *Jerry v. The State*, Id. 396.

One object of our revised statutes was to get rid of those technical difficulties that had so justly been complained of as a disease of the law; which, without being necessary for the protection of any substantial right of the accused, had so frequently entangled justice in the net of form; and this object of the legislature will certainly be best promoted by adhering to the common law form of indictment in cases of murder, the

nature of which offense has not been materially changed in the revision of the laws.

I think the judgment of the court below is right, and that it should be affirmed. I am also of the opinion that in a case like the present, where the execution of the sentence is respited by the governor until a particular day, it is the duty of the sheriff to proceed and execute the judgment of the court at that time, unless a further respite is granted, or the judgment has been reversed or annulled in the mean time. I am also of opinion that this is not a case in which it is necessary to sue out a writ of *habeas corpus*, and to have the convict brought into the supreme court before the sentence of the law can be executed upon him. The judgment of affirmance may, therefore, contain a special direction to the sheriff to execute the sentence on the day to which the execution thereof was last respited by the governor.

It being the unanimous opinion of the court that the judgment of the supreme court ought to be affirmed, it was accordingly affirmed.

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THAT A COMMON LAW INDICTMENT FOR MURDER is good under the revised statutes, as here decided, is recognized to be the settled law in New York, the "premeditated design," described by the statute, being comprehended by the averment of "malice aforethought:" *People v. White*, 22 Wend. 176; S. C., 24 Id. 572; *People v. Clark*, 7 N. Y. 394; *Fitzgerald v. People*, 37 Id. 416, 420, 422; S. C., 49 Barb. 126; S. C., 4 Abb. N. S. 71; *Donohue v. People*, 56 N. Y. 211; *People v. Gardiner*, 6 Park. 152; *Sullivan v. People*, 1 Id. 354; *People v. Lohman*, 2 Barb. 219. In *Fitzgerald v. People*, 37 N. Y. 422, it is said that this case "has stood the law on this subject for more than thirty years. To overrule it would be a rash overthrow of settled authority, under which many persons have suffered the extreme penalty of the law." The second subdivision of the revised statute, defining that it is murder when the killing is "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any individual," was construed in *Darry v. People*, 10 N. Y. 138; S. C., 2 Park. 632, to refer to those cases only where the act resulting in death was such as imperiled the lives of many without being aimed at any one in particular, and the *dicta* of Judge Nelson, in the principal case, in respect to constructive murder, arising from implied malice, are not approved.

WHERE A STATUTE CREATES OR CHANGES AN OFFENSE, an indictment for such offense must be drawn in reference to the statute: *People v. Fellingier*, 24 How. 343; although the precise words of the statute need not be employed: *Gouglemann v. People*, 3 Park. 20. And in respect to newly-created offenses, it is said in *People v. Berberich*, 11 How. 338; S. C., under the title *People v. Toyneer*, 2 Park. 358; S. C., 20 Barb. 213, referring to *People v. Enoch*, that "there could not be a stronger case to illustrate the rule that newly-created crimes are subject to the incidents of the class into which they

are introduced, without any express provision to that effect in the statute." A homicide committed while in the commission or attempted commission of a misdemeanor is manslaughter, not murder: *People v. Rector*, 19 Wend. 592, relying on the principal case.

STATUTORY DIVISION OF MURDER INTO DEGREES.—See the note to *Whiteford v. Commonwealth*, 18 Am. Dec. 774.

WHERE THE EVIDENCE IS SUSCEPTIBLE OF TWO ASPECTS, the court, on request, should instruct the jury in respect to both: *Foster v. People*, 50 N. Y. 601.

ON A RESPITE BEING GRANTED, the court of higher resort affirming the judgment of the court below has power to appoint a time for the execution of the sentence: *Matter of Application of Ferris*, 35 N. Y. 266; S. C., 32 How. 421.

ONE WHO, WHILE COMMITTING A FELONY, KILLS ANOTHER, is guilty of murder: 25 Am. Dec. 490. Homicide perpetrated through criminal lawlessness, is murder in the second degree: *Whiteford v. Commonwealth*, 18 Id. 771.

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## HONE v. HENRIQUEZ.

[13 WENDELL, 240.]

WHERE AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS FRAUDULENT, an auctioneer to whom the assignees have intrusted the effects to be sold has no lien upon the moneys realized from the sale, as against judgment creditors of the assignor, the auctioneer being himself a creditor, but having agreed to the assignment.

APPEAL from chancery. Moffat made an assignment to Hall and Swan of all his property, to be sold, and the proceeds to be divided among those of his creditors who would execute a release, conditioned that if all the creditors did not assent in sixty days, he should have the right to prefer creditors. Four days thereafter judgments were obtained against Moffat, and executions returned *nulla bona*. Creditors' bills were then filed, the assignment declared void, and Hall and Swan ordered to deliver the assigned property to the complainant, who was appointed receiver. The assignees gave the complainant an order on Hone for the property, it having been intrusted to him for sale. The property had been sold, and Hone refused to pay over the proceeds to Henriquez, claiming to have a lien thereon from the day of the sale, and insisting that his claim was superior to those of several judgment creditors by judgments recovered after the sale, and could not be postponed to the judgments of those who had filed creditors' bills, as the receiver held funds sufficient to pay them. The vice-chancellor ordered Hone to pay to the receiver the sum demanded, which decree being affirmed by the chancellor, this appeal was taken.

*W. Kent*, for the appellant.

*F. B. Cutting*, *contra*.

By CHIEF JUSTICE. The question is whether the deed of assignment was void absolutely, or voidable only upon the institution of proper proceedings.

The vice-chancellor has argued the broad question whether an assignment like the present is void or voidable; and comes to the conclusion that it is voidable only, and not void; and only to be avoided by proper proceedings, and a decree declaring it void. The chancellor confines himself, in his opinion, to the facts of the case, and says: "The defendant, Hone, having assented to the assignment by executing the same (his assent), it is not void as to him." This is the true ground upon which the decision should rest, and upon this ground it can not be controverted.

When is any assignment by a debtor fraudulent? It is only so, because the effect of it is to delay or defeat creditors in the collection of their demands. It is a proceeding, therefore, adverse to the interests and wishes of the creditors. But if all the creditors assent to such assignment, and agree voluntarily to take their proportion of the assigned property and discharge the debtor, there is no fraud in such a transaction, and of course such an assignment, executed with the assent of all the creditors, would be valid, not void. The assignment in the case now before us was declared void as to the judgment creditors who filed their bill to set it aside; but suppose those creditors had assented to the assignment as the appellant Hone did, would not they have been estopped from alleging any fraud, when, with a full knowledge of its effects, they had assented to it? It surely could not be said to have been executed with intent to delay and hinder them in the collection of their demands, when they had agreed to its terms. It is universally held, and so are all the cases, that deeds which are fraudulent and void as to creditors, are valid as between the parties. It is their agreement, deliberately entered into, and as between them, there is no fraud. They are not permitted to say that because it is invalid as to others, it is so as to them. The same reason does not exist. There was no attempt to defraud each other. The same reason applies to all who are parties to it—to all who, being affected by it, have assented to it—and fully sustains his honor, the chancellor, in the decision made by him, and the ground upon which he placed the decision.

Hone, in the case under consideration, can not be permitted to deny that Hall and Swan were the assignees of Moffat, nor that they were not lawfully in possession of the goods in question. He was therefore bound, as between him and Hall and Swan, to account to them, and should have paid over the proceeds to the receiver. It is well settled that the creditors acquire liens, and are entitled to priority of payment, in the order in which they had commenced their suits: 2 Paige, 568; and it is admitted that the receiver has not sufficient property in his hands to satisfy the judgments in favor of the creditors who have filed their bills in the court of chancery, to obtain payment from property which they could not reach by execution. There is therefore no equity in favor of the appellant, which will justify him in withholding the proceeds of the goods sold by him, on the ground that he is a creditor of Moffat. He insisted that he acquired a lien on the second of November, 1832. As against judgment creditors pursuing their legal remedies by creditors' bills, he has acquired no lien whatever. It is true, as he insists, that the assignment was declared void, but it was so declared as against the creditors who had filed their bill, not as against the parties to it, or those creditors who had assented to it. I do not mean to be understood as saying, that after the assignment had been declared void as to other creditors, the court would not, under a full disclosure of the circumstances under which a portion of the creditors had assented to it, declare it void also as to them, and permit them to participate in the relief given to the other creditors. I only intend to say that, as to such creditors who assented to the assignment, it is at most merely voidable, not void.

The decree of the chancellor should be affirmed, with costs.

The court being unanimously of the same opinion, the decree of the chancellor was accordingly affirmed.

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FRAUDULENT ASSIGNMENT FOR THE BENEFIT OF CREDITORS may be avoided by any creditor who has not assented thereto, whether provided for therein or not: *Leitch v. Hollister*, 4 N. Y. 215, on the authority of *Hone v. Henriquez*. But an assenting creditor thereto will not be permitted to attack it: *Rapalee v. Stewart*, 27 N. Y. 314; *Spaulding v. Strang*, 38 Id. 15; *Wheeler v. Wheedon*, 9 How. 301; *Powers v. Gradon*, 10 Bosw. 648; *Fox v. Clark*, Walk. Ch. 542. But one who receives a dividend under an assignment, the fraudulent nature of which he does not know, is not thus precluded: *Van Nest v. Yoe*, 1 Sandf. Ch. 16; nor is one who accepts no benefit under the assignment other than buying from the assignees some of the assigned property: *Hayduck v. Cope*, 53 N. Y. 76, all referring to the principal case. The subject of the effect of assenting to a fraudulent assignment for the benefit of creditors, upon the



parties' right to attack it, is discussed at large in the note to *Adlum v. Yard*, 18 Am. Dec. 621.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS** is valid where tainted with no benefit for the debtor, and with no undue preference: *Corning v. White*, 22 Am. Dec. 659; *Buffum v. Green*, 20 Id. 562; *Mackie v. Cairns*, 15 Id. 477 and note; *Austin v. Bell*, 11 Id. 297; *Wilkes v. Ferris*, 4 Id. 364; is good where executed, yet can not transfer property in a state by whose laws it is invalid: *Varnum v. Camp*, 25 Id. 476. If it is conditional, as demanding a release from creditors within a specified time, it is void as to non-assenting creditors: *Atkinson v. Jordan*, 24 Id. 280 and note; *Grover v. Wakeman*, 25 Id. 624; *McClurg v. Lecky*, 23 Id. 64 and note; *Lippincott v. Barker*, 4 Id. 433 and note; or if it reserves a portion of the property for the debtor or his family: *McClurg v. Lecky*, 23 Id. 64 and note; *Beck v. Burdett*, 19 Id. 436; *Mackie v. Cairns*, 15 Id. 477 and note; *Austin v. Bell*, 11 Id. 297. An assignment is good, although it contains no schedule of the property assigned, and omits to enumerate the creditors: *Deaver v. Savage*, 25 Id. 537; and an assignment of all the debtor's property, accompanied by an inventory embracing but a portion thereof, will be construed to carry all: *Wilkes v. Ferris*, 4 Id. 364 and note. And an assignment may prefer creditors: *Deaver v. Savage*, 25 Id. 487; *Grover v. Wakeman*, Id. 624 and note; but not in New Jersey: Id. 476; *Mackie v. Cairns*, 15 Id. 477; *Wilkes v. Ferris*, 4 Id. 364.

CASES  
IN THE  
SUPREME COURT  
OF  
NORTH CAROLINA.

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REDMOND v. COLLINS.

[4 DEVEREUX, 430.]

**COURTS OF PROBATE ACT IN REM**, and their sentences, upon matters within their jurisdiction, are conclusive upon other courts.

**COURTS OF PROBATE WILL RECALL THEIR OWN SENTENCES** for re-examination, at the instance of parties interested who have been, neither in fact nor in legal contemplation, privy to the proceedings upon which the sentences were based.

**PROBATE IN COMMON FORM** is where a will has been admitted to probate upon proceedings to which the executor alone is party.

**PROBATE IN SOLEMN FORM** is where, by summons to see proceedings, the executor has called in the parties interested to witness the proceedings, and to take what part therein they see fit.

**PARTIES IN INTEREST MAY INTERVENE** in a matter of probate, though summons to see proceedings has not issued.

**SENTENCES OF COURTS OF PROBATE ARE NOT RE-EXAMINABLE** at the instance of parties who have been privy to the proceedings.

**PRIVITY TO PROCEEDINGS IN A COURT OF ORDINARY MAY BE PROVED** by the allegations filed in the proceedings, by the summons to "see proceedings," and by the testimony of witnesses, or by other matter *in pais*.

**NEXT OF KIN WILL BE BOUND BY A SENTENCE** admitting a will to probate, though not party to the proceedings, nor summoned to "see proceedings," if, at the time of any prior contest over the probate, they had notice thereof and did not intervene.

**EXECUTOR CAN NOT REPROFOUND** a testament, pronounced against when first offered by him, otherwise than upon the ground of newly discovered evidence.

**THE EXECUTOR IS THE PROPER PERSON** to prove the testament, and will, at the instance of parties interested, be summoned by the ordinary to produce it, and either prove it and take upon himself its execution, or else renounce it.

**IF THE EXECUTOR RENOUNCE**, any party in interest may propound the testament.

**EXECUTOR IS IN PRIVITY** with the legatees claiming under the testament, and sentences against the testament, propounded by him, will be binding against them, even though they were, at the time of the sentence, laboring under such disabilities as coverture, or infancy, or even if at that time they were not yet *in esse*.

**EXECUTOR AND DEVISEE ARE NOT IN PRIVITY** at common law, nor are they made so by the statute permitting courts of probate to establish wills of real estate.

**DEVISEE MAY NOT REPROPOUND** to the probate court, in its dual character of will and testament, an instrument before rejected by it, when propounded by the executor named therein.

**DEVISEE MAY MAINTAIN EJECTMENT** upon the will, after it has been rejected by the court of probate, when propounded to it by the executor.

**COURTS OF PROBATE HAVE NO CONCERN** with the trusts of a will; for them, it is sufficient that the instrument under their consideration is adequate to pass the legal title.

**SENTENCES OF COURTS OF PROBATE AGAINST TRUSTEES** who have had notice, are binding, as far as that court is concerned, upon the *cestui que trust*.

**PETITION** for the re-probate of a will. The opinion states the case.

*Hogg, Devereux, and Mordecai*, for the plaintiffs.

*Badger*, contra.

**RUFFIN, C. J.** This is an application by petition to prove a paper as the will of Francis Porie, deceased. It is made by persons who claim an interest under the paper, as legatees and devisees. It comes before this court on appeal from the decision of the superior court dismissing the petition, and the questions here arise on the pleadings, and a case agreed by the parties in the record.

This is not an original application. It is stated in the petition that Barrow and Southerland, named in the paper as the executors, did in that character offer the same paper for probate in 1810, to which Daniel Redmond, the father of the petitioners, and the husband of Elizabeth, the only child of Porie, entered a caveat. That thereupon an issue of *devisavit vel non* was made up, on which the jury found, that the paper was not the last will and testament of the party deceased, upon which the court pronounced against the paper as a will, and granted administration to Redmond, the caveator. The petitioners allege that the verdict was the result of some unaccountable infatuation or corruption of the jury, or of a fraudulent combination and contrivance between the executors and Redmond, and they found the charges on the circumstances, that the factum of the

will and the sanity of Porie were indubitably proved, and that the executors neglected to appeal.

The paper is exhibited and contains the following provisions: "My will is that my houses and lots, together with my plantation, be rented out by my executors for eighteen years, and then to be sold by my executors." The profits of the whole, except the real estate, to be paid to his daughter by his executors for that term. The paper then goes on: "My will further is, that my executors shall hold all the residue of my estate in their hands for the said term of eighteen years, and at the end thereof my will is that two thirds of the estate, including the houses, lots, plantation, and other things so remaining in the hands of my executors, shall be equally divided or belong to the heir or heirs of her body, which my said daughter may have at that time, and the other third to be retained by my executors during the life of my daughter for her use, and at her death to go to such children as she may then have," in certain proportions.

Redmond disposed of all the personal estate (which was a large one), to persons unknown, and he and his wife conveyed the lands in fee, and they have since come by purchase, for valuable consideration, to Josiah Collins, who is in possession claiming title. It is admitted in the case agreed, that he had no notice of any defect of title when he purchased.

The petitioners are the only children of Mrs. Redmond, of whom one was born and of very tender years, at the former trial, and the other soon afterwards, and this proceeding was instituted soon after their coming to full age. Both their father and mother are dead.

The prayer is that the paper may now be admitted to probate, and that a copy of the petition may be issued to Collins, and he required to answer, and afterwards it was amended by having copies served on the executors, and calling for an answer from them.

The answer of Collins states the circumstances of his purchase, as already mentioned. Those of the executors explain the details of the trial, and admit that the verdict was in their opinion erroneous, but they deny any fraud on their part, and state that they employed respectable counsel, and offered all the necessary proof, and under advice did not consider themselves bound to appeal, and incur the risk of costs without any interest of their own.

The case was argued at the bar upon the footing that the

executors were bound to appeal, after having undertaken the office, and that their neglect in that respect was a distinct ground of fraud or laches, on which this application ought to be sustained. The court is certainly not satisfied with the correctness of that conclusion, if the premises were admitted. The misconduct of the executors might subject them, in the proper court, to the demand of those whose rights as legatees, had been prejudiced by their errors, omissions, or frauds. That would be upon the idea that the effect of such errors, omission, or fraud, was a sentence upon the will itself, by which those rights were lost. But that sentence itself, as between the parties to it, or considering it as a proceeding *in rem*, as to those bound by the thing done, can be impeached only on the ground of collusion between those charged with taking care of the interests of the applicants, and the opposite party. What rule the court might feel it necessary to adopt in such a case of collusion—playing into each other's hands—it would be premature now to mention. In the case before us it would be deemed clear by us on the proofs, that there is nothing like it, and probably we might conclude in like manner, that the laches of the executors in not appealing was not fraudulent, that is *mala fide*, to abandon the legatees, but arose from a misapprehension of their duty and of their personal liability for costs. But we do not enter into those inquiries at all, because the record contains a statement of facts on which the superior court decided, and which is inserted in the record as a "case agreed on by the parties," for this court. In that it is expressly stated that the finding of the jury was probably wrong, owing to a misapprehension by the jury of the nature of the issue, but was not the result of any combination between the executors and Redmond, or of fraud on the part of the executors. The trial was therefore fair, and the executors kept back none of the proper proofs. They made a case on which the paper ought, as they then said, and as the petitioners now say, to have been pronounced a good will. The error was that of the tribunal, and not that of the parties.

The case is therefore now to be considered as one, in which the legatee propounds the will a second time, and asks his allegation to be sustained and admitted to proof, upon the sole ground that the former verdict and sentence was in itself wrong. It does not appear, indeed, what were the proofs offered before, nor can it be expected, according to our mode of proceeding by jury trial, upon *viva voce* testimony, that it

should easily be made thus to appear. But it must be taken, that no new proofs are to be offered, because there is neither a case made, that proofs then existing were held back by the executors, or that other proofs have since been discovered by the present parties. The application, then, is to the same court of probate, which formerly pronounced against the will, now to pronounce in favor of it upon the same evidence, or to open the case for evidence at large, without showing that such evidence was not before given, or could not then have been given.

In whatever tribunal such an application shall be made, whether of law, of equity, or of ordinary, it must be rejected upon one general principle of universal and necessary application, that there must be an end of litigation, and that where the same case has been once appropriately and judicially examined and decided, the decision is conclusive.

The case before the court, it is contended, is without that principle, because the persons now propounding the will were not parties to that proceeding, and their interests ought not to be bound by the judgment.

The question is somewhat novel in the courts of this state, but much of its difficulty has been removed by the researches of the counsel on both sides into the adjudications of the courts of probate, from which the idea of our own has been derived, and the course of proceeding and principles of action adopted by those courts. These have all been considered by the court, assisted by the arguments of real ability offered at the bar. The summary of the doctrine touching those peculiar jurisdictions, is that they proceed according to the civil law. Their action is *in rem*, and hence when a matter is not within their jurisdiction, their sentence is void, and when within it, it is conclusive upon other courts, and upon all persons, until vacated in the court itself which passed it. But as every judicatory having any pretensions to administer a code of law so as to make it practically a just system, having respect to the rights of persons in the thing, these tribunals do not hold those bound by the sentence, who had no notice of the pendency of the proceedings on which it was pronounced. At the instance of one thus situated and concerned in interest, the former decree is called in, and the matter again taken *sub judice*. Proceeding *in rem*, it has peculiar modes by which persons are to be affected with notice, or may contest an application before it may be made, or may become parties, as we express it, at common law.

When a will is offered for probate an allegation in writing is exhibited, stating the will, the circumstances of the party deceased, the factum of the will, the intention that it should be testamentary, its attestation, and all the proofs the person propounding the allegation can, and expects to make. There are no parties made, that is, none stated in the allegation itself, on whom process is to be served, to constitute an adversary contest. If the case made in it be insufficient to establish the will, the opinion of the court is expressed thereon in the first instance, and the allegation propounding the will is rejected. If it be sufficient, it is admitted to proof by sentence; and the person who put in the allegation is thereby allowed to examine the witnesses mentioned by him, to the points stated in the allegation, and if the proofs support the allegation, the decree is of course. To these proceedings no individual is necessarily a party but the person propounding the paper, nor is any bound conclusively by them, but those who are privy to them, that is, have knowledge of them, either actual or presumed. But all may become parties and will be heard upon making an interest in themselves appear. To enable the propounder to bind others, a decree is taken out by him authorizing him to summon all persons "to see proceedings," not to become parties, but to witness what is going on, and take sides if they think proper. If the propounder does not choose to adopt that course, he may at once take his decree; which, in relation to this subject, is called proving the will in common form. If he take out a decree and summon those in interest against him "to see proceedings," they are concluded, whether they appear and put in an allegation against the will or not, and as against those summoned this is called probate in solemn form.

But besides these methods, there is another by which persons may be heard and concluded. If the propounder will not take out a decree "to see proceedings," a person in interest is not bound to wait the result of that proceeding, and then prefer an allegation to call in the decree made on it, and asserting his own rights; but he may at once "intervene" by a counter allegation, because the proceeding is *in rem*, and all shall be heard. Upon which intervention, each of the persons are of course bound by the sentence as before. But in none of these cases is the sentence re-examinable at the instance of one who before propounded the allegation, or who intervened, or who was summoned to see proceedings, or who is represented in fact or in legal contemplation by one thus situated. Differing somewhat

in the forms of proceeding, yet in substance these courts thus appear to act upon the same great fundamental principle of justice, which guides the courts of common law, in determining who shall or shall not be bound by their adjudications. The latter courts, being courts of record, look only to the record for the parties, and the obligation of the judgment. The court of the ordinary is not a court of record, and therefore, in each case, the inquiry is open, who was, and was not privy to the proceedings. Privy is established by the allegation filed, whether of propounding or of intervening, and by the summons on file "to see proceedings." Thus far the privy is shown by similar, though not by the same means. But the ecclesiastical courts take a further step, and allow the privy to be proved by the testimony of witnesses, or otherwise *in pais*.

The whole doctrine of probates was gone into upon the argument, more at large than we deem it necessary to pursue it. It may be useful, however, to advert to the observation, that probate in common form may be called in at any time, according to the cases of *Satterthwaite v. Satterthwaite*, 3 Phil. 1, and *Finucane v. Gayfere*, 3 Id. 405. Upon the principle of common justice, before mentioned, this is generally true, because a probate in that form implies that there was no privy in the next of kin, and even the receipt of a legacy under the will by one of the next of kin will not, in all cases, bar his right to call for a probate in solemn form: *Core v. Spencer*, in *Bell v. Armstrong*, 1 Add. 365. But an acquiescence for a long time, not accounted for, would bar him, either as implying a waiver of right, or notice of the former proceedings: *Bell v. Armstrong*. And it is settled that one of the next of kin is barred from calling in a probate by being cognizant of a prior suit, in which the will was contested by others of the next of kin, though not himself an intervenor, nor summoned to see proceedings: *Newell v. Weeks*, 2 Phil. 224; *Wood v. Medley*, 1 Hagg. 645. The cases of *Dickenson v. Stewart*, 1 Murph. 99; *Moss v. Vincent*, 2 Car. Law Repos. 414; and *Jeffreys v. Alston*, Id. 634, adopt the same principle here.

But the case of a probate in common form, and the proceeding to call it in, is very different from, and has very little application to that of calling in administration, and of a second attempt to prove the same paper as a will. The proper solution of the latter question in our law renders it necessary to consider the paper first as a testament and then as a will. In each point of view, the present applicants appear to have an interest



in the first as legatees of a part of the personal estate, and in the latter as entitled either to the legal estate in the land, as heirs of their mother, or as *cestuis que trust*, under the provisions of the will, of the proceeds of the sales of it. As a testament, undoubtedly the executors themselves could not repropound the paper. First principles forbid that, since if they could, the sentence would not be final in the court pronouncing it, for any purpose. It may be yielded that upon newly-discovered evidence they might. If they could in that case, it would be allowable only when applied for in due season, and under such circumstances as would induce a court of equity to order a verdict at law, obtained by fraud or surprise, to be set aside and the issue retried. The resort to equity is in that case rendered necessary by the inability of a court of law to reform its judgments after they are rendered. The ecclesiastical courts are not under that restraint, and therefore the parties affected need not apply to equity. But the principle on which equity relieves against a judgment is a sound one, and is the only one on which the ecclesiastical court can regulate its own discretion. Hence it seems agreed that upon facts *novita perventa*, and only in that case, an executor might repropound a will before pronounced against: *Wood v. Medley*, 1 Hagg. 645. The question is, whether one claiming as legatee can do in this respect, what the executor himself can not. It is laid down, both by common law and ecclesiastical authorities, that the person alone by whom a testament can be proved is the executor named in it (Salk. 309, Swinb., pt. 6, sec. 12), and that he may be summoned by the ordinary to produce the testament, prove it, and take on himself its execution, or refuse the same. This summons the ordinary will issue at the instance of any person having an interest, even a creditor of the party deceased, and much more one to whom a legacy is given in the paper, and it is required by one act of 1777 (Rev., c. 114, sec. 52), to be issued by the county court. Doubtless, if the executor renounce, any other person interested may propound the will. Thus far the executors and legatees are viewed as persons having distinct rights and duties. But if the executor, of his own accord, or on citation, propound the paper himself as a testament, we find no case or principle which requires that the legatee shall also propound the paper, or intervene, or be cited, in order to make a sentence of rejection obligatory on him. Although not formally or apparently upon the files of the court, personally privy to the proceedings, he is so substantially

through the executors. The executor is called *pars principalis* or *legitimus contradictor* who is bound and authorized to act for all persons entitled as legatees under the testament, nay, in *Wood v. Medley*, Sir John Nicholl said he was more. He was the person especially selected by the party deceased to carry his will into effect.

In that case there were two papers, in one of which Cundy was named as executor, and in the other not; by the latter alone the interest arose to Wood. Cundy propounded both, and his allegation was rejected. Afterwards Wood propounded an allegation to call in the administration, on which the administrator appeared under protest, which was allowed to stand over, in order that the legatee might, on showing that he was not cognizant of the former proceedings, bring in an allegation on the testament under which he claimed, because the two papers were distinct, and the legatees claimed under that in which no executor was named. Wood then put in an allegation propounding both papers and praying probate to Cundy, which was not admitted to proof, but rejected on its own terms and the affidavits annexed. This was upon two grounds: the one, that although the interest of Wood arose on one of the papers only, yet he did not swear that the facts alleged by him were newly discovered, and that he believed he should make due proof of them, which had been the condition on which the allegation was admitted, without deciding on the protest. The other, that without proof of collusion, the legatee was bound by the former sentence upon those papers, when both of them were propounded by Cundy, then alleged, and also again in this proceeding, alleged to be the executor of both. The judge expresses a doubt whether, considering the form in which the allegation is brought in, alleging Cundy to be executor, and probate to be made by him, he ought to consider any but the last point. But assuming that not to be law, he thinks the case for the administrator, because the affidavit was insufficient as to new discoveries, and because the facts alleged did not make the paper a will. But he lays down the doctrine generally in this case, and in the previous one of *Colvin v. Fraser*, 1 Hagg. 107, that the legatees are bound by the acts of the executor in respect to probate, unless there be collusion. What would be the effect of collusion upon the proceedings in that court, or how the legatee could be redressed therefor, whether in that court or in a court of equity, he does not then say: nor, as this is not a case of that sort, is it necessary we should say.

There is a privity between the executor, and legatees, and creditors, which causes the latter to be *prima facie* bound by the acts of the former in respect of proceedings to establish the testament, and obtain probate. By the appointment the executor takes in the first instance, the whole legal estate in the personal property. He is delegated by the testator to carry his will into effect, to guard the interests of his legatees, and especially those under disabilities, and of his creditors, against all other persons. He is therefore the *pars principalis* through whom all the others derive their interest, and who in a controversy with third persons upon the validity of the instrument by which his office is constituted, and their interests conferred through him, he is a necessary, and the only necessary actor. Hence he is deemed the legitimate allegator or contradictor, and all other persons are bound by his acts, as his is the primary interest, and theirs are dependent upon, and deduced from his. This is in truth, but another application of a well-known principle both of common law and of equity. An executor is not obliged to plead the statute of limitations. He may confess judgment to creditors. The legatees are bound at law, and also in equity, unless in the latter case they can show the debt not to be due, and collusion between him and the pretended creditor. So the executor alone brings a bill for an equitable money demand of the testator; and is the only necessary party to a bill by creditors for an account of the assets; neither the particular nor the residuary legatee being required, although the amount of assets to satisfy them may be affected. It may be taken then as the settled doctrine of the ecclesiastical courts, that unless under special circumstances, the legatees, though not intervening nor cited, are bound by a sentence rejecting a testament. They take benefit by a sentence pronouncing for the paper, and must submit to the consequences of a contrary one. No case is found, that infancy or coverture or non-residence, or that the legatee was even not *in esse*, are of themselves such special circumstances. It would be most unreasonable that it should be, for it would expose the administrator to successive attacks from each legatee as he came of age, or into being, and there would be no security for property bought under the warrant of an apparent legal authority, as an administration granted when there is a will, is void, and no title can be made under it. What might be the effect of a mere attempt of the executor *ex parte* to obtain probate in common form in our courts, which was not at first allowed, might admit of question,

as respected either his own right to offer the testament a second time, or that of a legatee to summon him to do so.

Our practice is so very informal, having no vestige on record of such an application, as to render it probable that the sentence would not be considered in itself definitive to any purpose. But we think clearly that a verdict and judgment upon an issue formally made up between the executor and one of the next of kin, upon which, if found for the executor, the probate, as between those parties, would be in solemn form, and settle the rights of the legatees under the will, is also when found against the paper, and without collusion, conclusive against the legatees, whether parties or not to the issue. Our statute which orders the issue and jury trial did not intend to alter the law in this respect. Under it the practice has been to dispense with the former allegations in writing required by the ordinary, and to make the allegation *ore tenus*, in general terms, and thereupon the court directs an issue upon which the whole matter is tried by the jury. Yet as before, only a person in interest can be heard against the will, and all such persons may be bound either by making themselves parties, *nominatum* of record to the issue, or by being cited by either side, or by being duly represented. The proceeding was not intended to be strictly one at common law with its process, pleadings, and judgment between parties. The sole object was to alter the mode of trial, substituting that of a jury with *viva voce* testimony as most approved, for the former one of written allegations and examination upon interrogatories, and a decision by a single judge. The next of kin may therefore yet require, if he was not cited, nor conusant of the proceedings, that a probate by the executor may be revoked, and a re-probate had. His right does not arise out of that of the executor, and therefore is not subordinate to it, but primary and in opposition to it. But a legatee is, as it were, the *cestui que trust* of whom the executor is the trustee, and the trust goes with the legal title to which it is attached, the remedy of the *cestui que trust* being primarily against the trustee, and exclusively against him, unless there be collusion between him and the person in possession.

Merely as a testament, our opinion therefore is, that the rejection of this paper is, in the case stated and agreed, conclusive on the executor and the petitioner, in the court of probate, as in other courts.

The applicants, however, insist upon their rights in the real

estate as entitling them to this relief, because as to the land they are not represented by the executor as such. This is clearly correct at common law, for the ordinary can not take probate of a will of lands, and if he does, it does not operate to establish the will as a devise. It is insisted that our law has altered that, by giving that power to our courts of probate, and it is argued by the counsel on both sides, that the grant of the power makes its exercise indispensable to render the devise effectual. From that position, however, very different and opposite conclusions are drawn by the respective counsel. Those opposed to this application contending that thereby the act of the executor becomes as binding on the devisee, as it was before on the legatee; while those for the petitioners urge that they must have a right themselves to prove the will as to the devises, because they were not as to them represented by the executor, and will therefore be condemned unheard.

The court can not concur in the opinion that devises are concluded by the sentence against the will, when propounded by the executor alone, without citation to or intervention by the devisees. We do not think the relation between the executor and devisees was intended to be altered in any important respects by our statute, any more than that pre-existing between the executor and the legatees, especially in the essential particular of concluding the devisee. But we do not, on the other hand, deem this the proper remedy of the devisee, nor think that he may, as devisee, repropound the paper both as a will and a testament, and ask probate thereof as such. We confess we should think so, if the devisee had no other redress. It is a sacred principle that every person must be heard either by himself, or through one legally representing him, before he shall be concluded in his rights. This principle is of such universal utility and application, that it can not safely be violated in any case. It must be respected whatever inconveniences may arise from it to third persons; but it may, and ought to be so respected as to produce as little inconvenience to third persons as possible. The question as to the lands is between the devisees and the heir; to which the executor and the legatees are in no wise parties, nor can the executor meddle with the land at all. Papers to pass land and personalty are to be executed in different manners, and sustained by different proof, and they may be revoked by different means. Until 1784, wills of land were proved here as in England, upon ejectments, or upon an issue out of chancery. The statutes of that year (Rev., c.

204, 225), prescribe the ceremonies to make a good will of lands, as to their formal execution; and the previous acts of 1715 and 1777 (Rev., c. 10, 115), having required wills to be proved and deposited in the county courts of probate, the sixth section of the act of the second session of 1784 makes such probates, as well made before as those to be made thereafter, sufficient evidence of the devise of lands, and also attested copies evidence in the same manner as the originals, with a proviso that upon a suggestion of a fraud in the drawing or obtaining it, or any irregularity in the execution or attestation, the original shall be produced.

This act did not, we think, render the rejection of the paper as a will, when offered by the executor, more conclusive on the devisee, than its probate would be on the heir. As to the latter it is clear it is not conclusive, but must be again proved on the trial upon a proper suggestion; for, as Judge Haywood asked, in *Ward v. Vickers*, 2 Hayw. 164, why is it to be produced but to enable the court and jury to decide whether the former probate was right? A proved will is therefore only *prima facie* evidence against the heir. So one not proved is not conclusive evidence against the devise. The act does not require wills for lands to be proven and recorded in order to pass the estate, as the statute of uses, or our act of 1718 (Rev., c. 7) does as to the enrollment and registration of deeds. A will is not pleaded as being proved and recorded, but only duly executed: the circumstances of probate and recording are alleged to dispense *prima facie* with further proof, but not as constituting the validity of the instrument. A devisee, it seems to us, may therefore yet bring his action of ejectment upon the will before probate or after the rejection of it, at the instance of the executor, and establish the will on the trial, or, in a proper case, prove it in chancery as before the act of 1784. The object of that act was to ease the devisee in his proofs in ejectment. We should so think upon the words of the act; but no doubt is left in our minds, when we consider the effects of an opposite construction. We set out with the principle that the devisee is not concluded by the act of the executor. If he be not, how is he to avoid the consequences of a refusal of probate to the executor? That is the question. It can only be in one of two ways; either to allow him to prove the will, as at common law, or that at his mere pleasure the former administration is to be annulled, and a reprobate had. In the latter case, the whole personal estate and its administration to creditors and next of kin, is thrown into

confusion, and the greatest injustice done to persons who can not, in any mode, be heard in the proceeding for re-probate. Besides there is a contradiction in the thing itself. A party claiming under the will can not ask probate for himself, but for the executor only. Hence the executor would get by means of another person with whom he is in no privity, the very thing which he is precluded from asking for himself; this follows certainly as it seems to us. For the jurisdiction is, as it were *in rem*, and the probate is an entire thing and can not be set aside but *in toto*. Between these inconveniences the election is not difficult, and we are led without doubt, to choose that which is confined to those persons whose interests alone are concerned in the pending contest, and which may thus be kept distinct from those of all others. For these reasons the court can not concur in the conclusion to which Judge Haywood arrived, in his note to *Ward v. Vickers*, and we agree in the judgment given by Judge Johnston in that case, though not precisely, as will be seen for his reasons. In support of the opinion entertained by us the case of *Henry v. Ballard*, 2 Law Repos. 595, is in point. The probate of the will in the county court was objected to, because the certificate did not state that it was proved to have been attested by two witnesses; but the will was thus proved on the trial of that action by two witnesses. The court held the will sufficiently proved, and admissible without reference to the certificate of the former probate.

The only doubt that can be raised upon this subject is suggested by the act of 1789 (Rev., c. 308), which gives the issue and jury trial in all cases, as well of the wills of land as of testaments. But we do not think that a serious one. It so far modifies the law as to allow the heir and devisee to be parties to that issue, and doubtless those who are parties to it are bound as in other cases. It is made a mixed proceeding, partly partaking of the nature of one before the ordinary, and partly of an action of ejectment, or issue out of chancery. Persons may take the benefit by it who are not strictly parties to it, and they make themselves parties by intervening, if the expression may be allowed, that is, by taking sides upon record, and they may be bound by being cited and not appearing, or by refusing to take either side upon appearance. Hence the principal effect of the act is to render unnecessary the resort by the devisee to a court of equity, because in most cases the will can be conclusively established against the heir by one trial at law. But if the heir can not be cited to appear at law, or if, as here, the

case is in such a state that the devisee can not directly make up, at law, the issue of *devisavit vel non*, there seems to be no reason why he should not have the usual relief in equity to establish the will, while proof is in his power.

The question has been thus far considered in the most favorable manner for the petitioners; as if they were the devisees of the land. If that were the case we think they could not succeed in this application, because they would have another remedy more appropriate to that right, and exclusively against those claiming in opposition to it, and unattended by consequences to the prejudice of third persons.

Upon the will before the court, the petitioners are not devisees. It may be a question of some nicety whether the legal estate in the land is vested in the executors or trustees, or whether a power only is given to them, and that the land descended to the heir, Mrs. Redmond. We do not examine the point, because in either event it would not help the petitioners.

Unquestionably a court of probate, as such, can not regard secondary equitable interests arising out of a legal estate in land given in a will, as distinct from the legal estate itself, for the purpose of determining whether the proper persons have had notice. The question before such a court is, whether the paper is duly executed to pass the legal estate. It has no concern with the trusts upon which it is given, or the construction of the will, which must be enforced in this, as in other respects, in another court. If the trustee has violated his trust by misapplying the estate, or refusing to establish the will, or colluding with the heir, the *cestui que trust* must seek his redress against him and the party colluding, where his own rights are recognized and can be enforced.

If the land descended subject to a power, it is liable to the same observations. Those equitably entitled under the power must establish the will, and assert their equity as against the executors in chancery; where it may be, they may be compelled yet to execute the power, so as to try the legal title at law, or may be required to make good the loss to the petitioners, as the merits or demerits of their conduct may be made there to appear. But it would be absurd to say that the executors, whether the devisees of the land, or the depositaries of a legal power, are not bound in respect either of their estate in, or authority over the land, by the verdict to which they were parties of record. If they are concluded, so we think, upon all the principles applicable to trusts, the *cestuis que trust* must



be as to all persons but the trustees themselves, and their confederates, in a court of equity, and as to all persons in every other court.

The detail into which this discussion has gone, was deemed necessary from the novelty of the inquiries, and the extent to which the argument was carried at the bar. It is important that the subject of probate should be more generally understood, and particularly the effect of the rejection of a will, when offered by the executor, upon the rights of legatees and devisees respectively in our law, as modified by statutes. The court has therefore thought it a duty to examine those questions minutely, that the grounds might be made plain, on which we feel bound to affirm the judgment of the superior court dismissing the petition.

By COURT. Judgment affirmed.

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THE PRINCIPAL CASE IS CITED upon the following points: A verdict against a will propounded by an executor, in the absence of collusion between the executor and caveator, is binding on legatees, even though a different result might have followed had the executor appealed: *Harvey v. Smith*, 1 Dev. & B. 186; *Edwards v. Edwards*, 3 Ired. 82; a privity exists between executor and legatees and creditors, which will cause the latter to be bound by the acts of the former: *Edwards v. Edwards*, Id.; *Leigh v. Smith*, 3 Ired. Eq. 442; *Gash v. Johnson*, 6 Ired. 289; *Eltheridge v. Corpreur*, 3 Jones, 14. All who have notice or knowledge of proceedings in a probate court, are bound by its sentence: *St. John's Lodge v. Callender*, 4 Ired. 335; *Armstrong v. Baker*, 9 Id. 109; a devisee may bring an action of ejectment upon a will before its probate, or after its rejection, and then establish it on the trial: *Morgan v. Bass*, 3 Id. 243; a court of probate has no concern with the trusts created by a will; the only question before it is, whether the paper is duly executed to pass the legal estate.

PERSONS NOT REPRESENTED BEFORE THE COURT BOUND BY ITS PROCEEDINGS, WHEN.—“If several estates in remainder be limited in a deed, and one of the remainder-men obtain a verdict for him, on an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainder-man, in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, because they all claim under the same deed.” *Pyke v. Crouch*, 1 Ld. Raym. 730; *Rushworth v. Pembroke*, Hardr. 472; *Doe v. Tyler*, 6 Bing. 390; Bull. N. P. 232; *Freeman on Judgments*, sec. 172.

Whether a reversioner shall have the advantage of a verdict for, or be bound by one against the tenant in possession, is more doubtful. No question is here made of the cases where the reversioner is an actual though not nominal party to the suit, as where the landlord defends the ejectment brought against his tenant, for here the reversioner is bound, because he has been represented before the court; wherefore it is that a verdict against Doe shall bind his lessor, A.: *Doe v. Seaton*, 2 Crompt. M. & R. 728; *Doe v. Huddart*, Id. 316; *Stark. on Ev.*, 327; 2 Smith Lead. Cas., note to *Duchess of Kingston's case*, 684. The cases which are now under consideration are of

that class, where the reversioner has been neither in form nor in fact a party. The more correct view seems to be, that the reversioner should not be bound: *Adams v. Butts*, 9 Conn. 79. Buller, in his *Nisi Prius*, page 232, says, "that if there be recovery by verdict against the tenant for life, this is no evidence against a reversioner; for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner can not possibly controvert the matter where no aid is prayed. But if he come in upon an aid prayer, he may have an attaind, and consequently the verdict will be evidence against him." See also 1 Stark. Ev. 325.

Upon the other hand, the old cases of *Lincoln v. Ellis*, Bunb. 110, and *Rushworth v. Pembroke*, Hardr. 472, assert that a verdict against a lessee is evidence against the reversioner.

It is not apprehended that the verdicts, if evidence, could be of a conclusive character; in fact, as the doctrine must have been more called upon in actions of ejectment, and as in ejectment the lessor of plaintiff could renew his action at pleasure, no conclusive character to the evidence could well be.

In equity, the doctrine attains higher importance. In that forum the first vested estate of inheritance is considered as so representing estates limited to take posterior to it, that they shall be bound by a decree in a cause to which the owner of the first mentioned estate is party. This, upon the ground of convenience, and upon a recognition of the manifest identity of the interests of the owner of the first vested estate of inheritance, and of the owners of the estates subsequent to him.

The rule is subject to this qualification, that a decree in a suit to which the owner of the first vested estate of inheritance is a party, shall only be binding upon the remainder-men, if the charge with which the estate is sought to be affected is of that character that it would have bound the estate had it been in the hands of the remainder-men, with like effect as it does the estate of him prior to them. Thus, if an equity of redemption be parceled up by its owner, by the creation of successive estates therein, it is clear that the right to foreclose exists against all the different parties interested in the equity, and it will therefore be sufficient for the mortgagor wishing to foreclose, to bring before the court the owner of the first estate of inheritance in the equity, and those holding estates prior in enjoyment, to enable the court to make a decree binding upon all parties: *Nodine v. Greenfield*, 7 Paige, 549. But if the tenant in tail be sued upon his contract with reference to the estate, the decree can bind his estate, but not that of the remainder-men: *Lloyd v. Johns*, 9 Ves. 59.

In support of the rule, with the qualification just mentioned, are *Mud v. Mitchell*, 17 N. Y. 210; *Cheesman v. Thorne*, 1 Edw. Ch. 629; *Baylor's Lessee v. De Jarnette*, 13 Gratt. 166; *Faullner v. Davis*, 18 Id. 688; *Giffard v. Hort*, 1 Sch. & Lef. 407; *Hopkyns v. Hopkyns*, 1 Atk. 590; *Finch v. Finch*, 2 Ves. sen. 590; *Pelham v. Gregory*, 1 Eden, 518; *Cockburn v. Thompson*, 16 Ves. 326; *Reynoldson v. Perkins*, Amb. 52; *Wills v. Slade*, 6 Ves. 498; *Freeman v. Freeman*, 2 South. L. R. 168; *Freeman on Judgments*, sec. 172; *Calvert on Parties*, 59; *Story Eq. Pl.*, secs. 144, 792.

There are cases, however, which clash with the rule. In *Goodess v. Williams*, 2 You. & C. 598, Vice-chancellor Knight Bruce says, that where the person seised in fee is liable to have his seisin defeated by a shifting use, conditional limitation, or executory devise, he shall not sufficiently represent the remainder-men, but these must be brought before the court. But in this case it is noticeable that the remainder-men so required to be made

parties were *in esse*, and therefore the making of them parties could work no great inconvenience. In *Mead v. Mitchell*, 17 N. Y. 210, it is insisted that if the rule laid down in *Gooless v. Williams* be correct, its scope must be limited by the last consideration.

In *Dursley v. Fitzhardinge*, 6 Ves. 251, a tenant in tail being a minor, persons in remainder were made parties to a bill to perpetuate testimony of his father's marriage, whereupon they demurred; their demurrer was overruled. Lord Eldon here intimates that where the first estate of inheritance is in a minor, that will afford ground for making the remainder-men parties; as a minor will hardly be intended a proper representative of all the interests at stake.

But the case most at variance with the rule is that of *Downin v. Sprecher*, 35 Md. 478. There A. was the owner of one undivided sixth part of an estate, for life, remainder in fee to her male children on her body begotten or to be begotten. Partition was sued for, and A. and her two sons then living were made parties to the suit. The proceedings took such turn that a decree of sale of the premises was finally made, and they were accordingly sold. A. subsequently bore three sons. Upon her death, all five of the sons brought ejectment for the lands sold by order of the court in the partition suit. It was held that the decree was not binding on the unborn sons. The case is anomalous, and totally at variance with the spirit of those first cited.

In Illinois it has been held that a posthumous child takes directly from its parent, and is not bound by a decree made before its birth in a suit to which the then representatives of the estates were parties: *Detrick v. Migatt*, 19 Ill. 46; *McConnell v. Smith*, 23 Id. 611.

In cases where no person is *in esse*, in whom is vested an estate in inheritance, the rule is relaxed further, and the tenants for life will be considered to sufficiently represent the inheritance. Thus, where estates are devised to trustees charged with payment of debts, remainder after payment of the debts to A. for life, remainder in fee to his issue, an account taken between the trustees and A. will bind the after-born issue: *Leonard v. Sussex*, 2 Vern. 527; *Finch v. Finch*, 2 Ves. 492; *Dayrell v. Champness*, 1 Eq. Cas. Abr. 409; *Giffard v. Hort*, 1 Sch. & Lef. 407; *Baylor's Lessee v. De Jarnette*, 13 Gratt. 152; *Gaskell v. Gaskell*, 6 Sumn. 643; *Allen v. Papworth*, 1 Ves. sen. 163; *Mead v. Mitchell*, 17 N. Y. 210; *Cheesman v. Thorne*, 1 Edw. Ch. 629; Calvert on Parties, 60; Freeman on Co-tenancy and Partition, sec. 482.

EX PARTE PROBATE of will is revocable at any time by the order of the court that granted it; but if the probate was after sufficient citation, then it can not be revoked, but may only be reversed on appeal: *Sneed v. Ewing*, 22 Am. Dec. 41.

PROCEEDINGS IN AN ORPHANS' COURT, for sale of land, are *in rem*: *McPherson v. Cunliff*, 14 Am. Dec. 642.

That courts of probate act *in rem*, see note to *Duchess of Kingston's case*, 2 Smith Lead. Cas. 689.

## DEN EX DEM. HARRY v. GRAHAM ET AL.

[1 DEVEREUX &amp; BATTLE, 76.]

**THE MORE CERTAIN OF TWO INCONSISTENT DESCRIPTIONS** of the boundary lines of a grant of land must be adopted.

**COURSE AND DISTANCE** will prevail in determining the terminus of a line over the further description of this point as being "near" to a given object.

**THE POINTS OF INTERSECTION OF THE LINES OF A GRANT** must be determined by survey of the lines in the order of their description in the grant, wherever the calls of the lines are of equal certainty; but if the description of the posterior line be more certain, or if from surrounding circumstances there be reason to believe that its description is the more accurate, then the point of intersection with the previous line may be determined by running such line reversed.

**THE CASE STATED IN AN EXCEPTION** will, by the revising court, be presumed correct, until its error clearly appear from examination of the whole of the record before it.

**FRAUD IN A PURCHASE AT EXECUTION SALE** can not be taken advantage of by strangers to the execution.

**EJECTMENT.** A question in the case was as to the land embraced in a patent to defendants' ancestor, Graham. Descriptions of its lines, by course and distance, were given in the patent; also there were descriptions of the *termini* of the different lines. Of these points, all were certain excepting that at which the second and third lines of the patent intersected. The terminus of the second line was described in the patent as at "a black oak, near his, Graham's, own line." Upon running this second line by course and distance, no black oak was found at its termination, nor did it extend to within thirty poles of any boundary line of land owned by Graham at the date of the patent. The claim of defendants, and the decision of the court upon this state of facts, will be found set out in the opinion. Defendants attempted to set up as a defense that plaintiff had at the sale upon execution under which he claimed, the execution being against one Collins, fraudulently discouraged competition. The jury was charged that this was of no avail. There was verdict for plaintiff, and defendant appealed.

*Pearson*, for the defendant.

*Iredell, contra.*

**RUFFIN, C. J.** The question of boundary arises upon the patent to John Graham, dated the twenty-fourth of November, 1813. The dispute is, how far the second line, which runs from the chestnut and red oak, shall go. The court held that it

stopped at the end of the distance; while for the defendant it is contended, that it shall be extended thirty poles further, so as to make it reach the line of another tract of the patentee; or, at all events, until it intersects with the next line reversed, from the post oak called for as the corner of Beard and the patentee, that corner being identified. This court concurs in the construction of his honor.

There is but one principle applicable to questions of this sort. If there be but one description in the deed, that is to be strictly adhered to. If there be more than one, and they turn out, upon evidence, not to agree, that is to be adopted which is most certain. Course and distance from a given point, is a certain description in itself; and therefore is never departed from unless there be something else which proves that the course and distance stated in the deed were thus stated by mistake. It has been held that a tree called for and found not corresponding to the course and distance, establishes the mistake, and is itself the terminus. So of the line of another tract of land. But if the tree be not found, nor its former situation identified, it is the same as if the call for it had been omitted; for there is then no guide but the course and distance. Such is the case here; no tree being found, nor its locality proved, otherwise than it is shown by the deed to have stood at the end of a line of a certain length. The description is therefore the same as if the call had been for a stake, or an imaginary point, at the end of the distance; unless the reference to the patentee's other line controls it.

The call is not for that line, or for a tree in it, but to one near it. The argument is, that as it can not be told how near, we must go to it. The argument would be strong if the call had been simply for a black oak near the line, as in the case supposed by the counsel, of a description beginning at a stake or tree, not found, near the middle of a field. There would be no point but the middle of a field to govern; and rather than the deed should be void for uncertainty, that would be adopted. But if the words of the deed were, "beginning at a stake near the middle of the field, and standing one hundred poles east from a certain tree," it would be different, because the former uncertainty, as to the point in the field which is the beginning, is removed by the mathematical certainty to be attained by mensuration from the other point given. That is precisely the case before us. The call is not merely for a black oak near the other lines, but that black oak is represented as standing north

forty-five degrees west, two hundred and twenty poles from a chestnut and red oak, which are found; which removes the uncertainty which, without any distance given, we should feel upon the point, how near the line of the other tract is to be approached.

So with reversing the lines. The party can not have recourse to that method of ascertaining a previous line in the order of the description, unless, by reversing, he gives a more certain means of identifying the prior line, than the deed gives in its description of that line itself. The natural order of survey is that which the deed shows the parties to the deed adopted, to identify to their own satisfaction the land intended to be conveyed by the one to the other. It may be considered as their directions, how the indenture shall be established by survey, at any future time, and it supposes certain points, as the beginning, to be established. If, therefore, the description of a particular line be complete in itself, the court can not vary from that description, because it will not correspond with the description of a posterior line, unless the description of the latter be more specific than the former, and unless from the latter, a mistake in the former can be clearly inferred. For example: if this deed had said that the line from the corner chestnut and red oak ran to a black oak near the patentee's other line, and gave neither course nor distance, or only one, "and thence north forty-five degrees east, two hundred and twenty poles, to a post oak, his own and Beard's corner," the line might be reversed from the post oak, to ascertain the corner of that and the next preceding line, because that affords the only evidence (the black oak not being found, or its locality otherwise identified) of the point at which the one line terminated and the other began. So if even upon such calls as the present deed contains, a line of marked trees were found, by tracing the line back from the post oak, corresponding with the survey for the three hundred acre patent, that might carry the other line to the point of intersection, because it would prove an actual survey, and be the evidence of permanent natural objects to show where the black oak once actually stood; which, wherever it stood, would be the terminus and control the distance mentioned in the deed. But there is no such evidence in this case; and in the absence of it there is nothing more to show that the mistake was made in the description of the second line than that it exists in that of the third line. A mistake was certainly made in the one or the other; in which, is the question. The one line has a certain beginning

and the other has a certain ending, and they meet at the same point, and that point of meeting is uncertain. It can not be rendered more certain by running to it, from either of the given points; and therefore we are not at liberty to resort to the description of the latter line, to control that of the prior line, but must lay down the prior one from its own description. Because it is prior, it controls the next line; since that begins where the other ended.

An effort was made to show from the deeds, of which copies form part of the case, that the land sold and conveyed by the sheriff to the lessor of the plaintiff, is not the same that he levied on. If that were true, the sale would be void as far as depended on the writs of *venditioni exponas*; and it would be proper to consider the answer to the objection founded on the writs of *fi. fa.* But we have not examined it, because the case stated in the exception affirms, that the sheriff's deed answers to the calls of the levies, and includes the field in the defendant's possession. Now, although the deed and levies are stated in the record to form part of the case, and therefore if they showed that the statement of the fact in the exception was founded on mistake, this court might decide according to the truth, as collected from the whole case; yet it must be presumed that the case stated is correct in point of fact, and it is impossible, without the aid of further evidence and surveys, for the court here to ascertain whether it be or be not correct.

No observation upon the point of fraud in the bidding can be necessary, in addition to that of his honor. If there was a fraud, it was on Collins, and does not concern the defendant, from whom no evidence of it ought to have been heard.

By COURT. Judgment affirmed.

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The principal case is relied upon as an authority for the following positions in the cases cited below. The case stated by the judge below will always be presumed correct, unless, after examination of the whole record, a mistake clearly appear: *Brown v. Kyle*, 2 Jones, 442. In locating a line, a call for "a Spanish oak in or near Richman's line," will not control the given course and distance of the line, the Spanish oak not being found, the word "near" being too indefinite: *Cansler v. Fite*, 5 Jones, 427. A posterior line will not be reversed, in order, by its intersection with a prior line, to show the corner, unless the description given of it be the more certain: *Safret v. Hartman*, 7 Id. 203.

The cases reported in this series upon questions of boundary, are collected in the note to *Wendell v. Jackson*, 22 Am. Dec. 635.

ACQUIESCENCE IN FRAUD by the party injured, effect of: *Christian v. Scott*, 18 Id. 68.

## MARKLAND, ADM'R OF TUCKER, v. CRUMP.

[1 DEVEREUX & BATTLE, 94.]

**A REMOTE ASSIGNEE MAY SUE UPON A COVENANT RUNNING WITH THE LAND,** whether or not he has taken from his immediate grantor with warranty. **NO INTERMEDIATE GRANTOR, THOUGH WITH WARRANTY,** can sue upon such covenant, unless he has previously made good to his grantee his damages suffered by the breach of the covenant.

**MEASURES OF DAMAGES UPON COVENANT RUNNING WITH THE LAND.**—Where a grantee with warranty has recovered against his grantor, after eviction suffered, the latter may recover, upon a prior covenant of quiet enjoyment, the amount he has been obliged to pay his grantee.

**RECOVERY ALLOWED UPON A COVENANT OF WARRANTY,** upon eviction, is the amount of purchase money paid, together with interest.

**ACTION UPON COVENANT OF QUIET ENJOYMENT.** The covenant was contained in a deed from defendant to plaintiff's intestate. An eviction from the land was suffered by Marcum, a purchaser of the land at a sale under *fi. fa.*, issued against the intestate. Plaintiff suffered a nonsuit, and appealed.

*Pearson*, for the plaintiff.

*Nash*, *contra*.

**RUFFIN, C. J.** The opinion delivered in the superior court is that entertained by this court, and very much upon the reasons expressed by his honor. For it would seem to be a first principle, that in an action sounding in damages, none can be recovered if none have been sustained by the plaintiff.

Marcum, the purchaser at sheriff's sale, has been regarded by the plaintiff's counsel as a purchaser with warranty; because, under the statute, he can have recourse to Tucker, the defendant in the execution. The court supposes it clear, that he is an assignee, who, by reason of the privity of estate, is entitled to the benefit of, and bound by all covenants running with the land: *Spencer's case*, sixth resolution, 5 Repos. 17. But whether such recourse against Tucker would amount to such a warranty, or ought to be construed to have the same effect, the court does not deem it necessary to determine. Because we think, an express warranty from Tucker to Marcum would not, upon the eviction of the latter, give an action to Tucker against Crump on his covenant of warranty, nor be a bar to that of Marcum against Crump on the same covenant.

In support of the proposition to the contrary, the counsel for the plaintiff has been able to adduce no case, in which that was the point adjudged. In *Kane v. Sanger*, 14 Johns. 89, Chief



Justice Spencer states the general rule to be, that where covenants run with the land, if it be conveyed before a breach of the covenant, the assignee only can sue upon the subsequent breach; but if the assignor be himself bound in his deed to indemnify the assignee against such breach, there the assignor only can bring the action.

This is certainly a very explicit declaration of the opinion of a most respectable judge. But it is not entitled to the authority of an adjudication; because it was not necessary to the decision of the case, and is only a *dictum*. There the plaintiff, who was the assignor, had immediately taken back the legal estate, by way of mortgage in fee; and therefore his assignee could not, under any circumstances, have had an action; for at the time of the breach, he was not the assignee, but the plaintiff was reinvested with the estate by force of the mortgage. Upon this ground the plaintiff had judgment. As it was held, that in the case proved, the effect of the plaintiff's warranty could not be a bar to the action, it became immaterial to determine what the effect would have been, if the estate had remained in the assignee, until his eviction. No English case is referred to by the chief justice, and but one in this country, that of *Bickford v. Page*, 2 Mass. 460. This last case does not seem to us to admit of such an interpretation. Chief Justice Parsons says, that "the assignee alone can sue, unless the nature of the assignment be such that the assignor is holden to indemnify the assignee against a breach of the covenants by the original vendor; which is founded on the principle, that no man can maintain an action to recover damages, who has suffered none." This is a very clear opinion, that an assignee without a covenant from his immediate vendor, may sue on a remote covenant; and that he alone can sue in such a case; and that for the very best of reasons—because nobody else is injured. But it affords no inference, that an assignee with warranty may not also sue on a remote covenant, but only, that in such case, he is not the only person who can have remedy for a breach. In the context, it must mean, that the assignee who is evicted may sue the remote covenantor for the damages sustained by him; but that this case is not like the former, in which he alone could have the action; because in this case, another besides the assignee may sustain damages, namely, his assignor upon his engagement to indemnify. As without such engagement the assignor could not sue, because he could not be injured; so where he paid the damages to the assignee upon such an engage-

ment, the assignor could sue, because he then had suffered. But because the assignor can bring an action after suffering, it does not follow that he can bring his action upon the eviction of his assignee, and before satisfying the assignee, and to the exclusion of the assignee himself. This construction of the language of Chief Justice Parsons is that adopted by the court in *Withy v. Mumford*, 5 Cow. 137, in which the doctrine laid down in *Kane v. Sanger* is pointedly denied under such circumstances as to destroy its authority, even in the courts of New York. For, had the point been necessary to a decision in *Kane v. Sanger*, it is adjudged directly to the contrary in *Withy v. Mumford*, in which it was held that the assignee who is evicted, may sue any one or more of the covenantors, whether immediate or remote; and that an assignor who has himself covenanted, can not sue a prior covenantor until he has himself satisfied the evicted assignee; but that upon doing that, he can.

This court is at loss for a reason upon which the first rule laid down in the supreme court of New York can be sustained, or the second can be impeached. If there be a reason, it must be peculiar to covenants and conveyances of land. None such is perceived; and to us the position contended for seems to be inconvenient, unjust, and contrary to analogy. It multiplies suits, by requiring each assignee to sue his own vendor only. It may defeat the evicted person of his damages, by enabling his insolvent assignor to recover the money from the only person, among those liable, who is able to pay it; and he may refuse to pay it over. Covenants which run with land were always exceptions to the maxim of the common law, that choses in action could not be assigned. They can not be separated from the land, and transferred; but with the land they could, as being annexed to the estate in possession, and bound the parties in respect to the privity of estate. In other instances of assignments tolerated by law, the assignee having for the time being the right, is alone entitled to an action on the contract, and may have his action against any of the parties bound, either mediately or immediately. Negotiable mercantile instruments afford a similar example. The holder may sue, not only his own indorser, but also any one whose name is on the paper. But an indorser can not have an action against any party prior to himself, until he shall have taken up the paper from the last holder, and thus become the holder to his own use. The good sense of this principle seems to make it neces-

sarily applicable to all cases of successive engagements of indemnity.

It is admitted that, if the grantee with warranty convey without warranty, the last grantee may sue directly on the covenant of the first grantor. It is not seen, why the interposing a second warranty should, nor how it can, restrict the assignee to a remedy on the last covenant. In each case, the first covenant came to him, as being annexed to the estate; and thus belonging to him, he, and not another, ought to have the action on it, until he gets satisfaction. When that is made, the person who makes it is then the injured person, and may have his action to make himself whole. It is for the benefit of all parties, that each claimant should have a direct recourse on the person ultimately responsible, if he be able to respond.

An argument was drawn for the plaintiff from the doctrine of *Buckhurst's case*, 1 Co. 1, that a vendor who warrants is entitled to keep the title papers, which contain covenants to which he may resort for his indemnity. The inference sought is, that if he has a right to the deed, it must be because he alone can bring an action on the covenants in them, or that such possession gives him the exclusive right of action. In our opinion, that consequence can not be deduced. It affords no better ground for his action for a breach subsequent to his assignment, than for such action before any breach, in anticipation of one. The possession of the title deeds may indeed put the assignee to a difficulty in framing his declaration, making profert, and giving evidence of a deed not in his own possession, which he must encounter, and get over as well as he can. Indeed, it may be, that he may be excused from a profert, if the record shows that he is not entitled to the deeds. But these obstacles merely arise out of the rules of pleading and evidence, as between the assignee and covenantor sued; and have no reference to the rights of an intermediate owner who has parted from his title. The first feoffor can make direct satisfaction to the person evicted, or take a release from him.

That an assignee may sue the remote covenantor, the case of *Middlemore v. Goodale*, Cro. Car. 503, is a direct authority. It is true that the plaintiff there did not state in his declaration that his conveyance was with warranty; so that the effect of such a covenant is not precisely shown by that case. But it is equally true, that it does not appear that the deed to the plaintiff did not contain such a covenant. Now, every declaration must give a complete cause of action, and if the law be,

that an assignee with warranty can not sue on any prior covenant, the declaration ought to aver that the plaintiff is an assignee without one. Nothing of that kind is found in that case, nor in the precedents. They are silent as to the covenants contained in all the deeds under which the plaintiff claims, except the particular covenants on which the suit is brought, and only set forth the operative parts of the deed, as conveying the estate to the plaintiff. Nor has any case or precedent been found of a plea, that the conveyance from the plaintiff's vendor, or from some assignor between himself and the defendant, did contain covenants, although the case of such covenants, posterior to that of the defendant in the action, must frequently have occurred.

But a still broader ground was asserted in the argument; which is, that even if the assignee Marcum could sue, yet the plaintiff, as administrator of Tucker, the defendant's bargainee, could also have his action: the two actions resting on different grounds; the former on privity of estate, and the latter on privity of contract.

For this no direct authority has been cited, and we suppose there can be none. For it is a proposition of simple justice to the covenantor, that both actions can not be maintained. It has, however, been likened to the case of the action of covenant by a lessor against an assignee of the lessee, and also against the lessee himself; both of which will certainly lie. That, however, is but the ordinary case of a creditor having a right to look to two persons severally for the same debt, from one only of whom is he allowed to collect it. This would be the anomalous one, of two persons having each the distinct right to recover and collect from a debtor, the same money, although he ought to pay it but once. The present case is really correlative, not to that of a lessor claiming from the lessee and his assignee the rent due him, but to that of a lessor who has assigned his reversion, and sues the lessee on the covenants in the lease for rent arising after the assignment.

That such an action can not be sustained upon the privity of contract, has been settled ever since Lord Coke's time: *Walker's case*, 3 Rep. 22. It is there laid down, "that if the lessor grants over his reversion, now the contract runneth with the estate, and therefore the grantor shall not have any action of debt for rent due after his assignment, but the grantee shall have it; for the privity of contract follows the estate, and is not annexed to the person but in respect of the estate." The explanation of

the difference he proceeds afterwards to give, and it is most reasonable. "The lessee himself," he says, "shall not prevent by his own act such remedy which the lessor hath against him; but when the lessor grants over the reversion, there, against his own grant he can not have remedy, because he has granted to another the reversion, to which the rent is incident." It is thus seen, that to an action by the lessor against the lessee or his assignee, it is a full answer, that the plaintiff had assigned before the rent accrued. The same principle embraces the present case. Tucker, the defendant's grantee, can not have the action, because he conveyed to Marcum, before the breach, the estate to which the covenant was incident, and the original privity of contract will not support the action, but in respect of the privity of estate continuing, or of the loss of the estate and damages thence arising to the plaintiff.

Indeed, if privity of contract alone was sufficient without reference to the estate, the present plaintiff might recover as well if his intestate had conveyed without as with warranty; for the covenants inserted in the deed do not make it more or less an assignment of the land. Yet the very cases cited admit the assignee's sole right to sue, if there had not been a warranty by his vendor; for if he had not the right, there would be no redress.

But there are other cases from which it is clear that mere privity of contract will not suffice to sustain an action; but the plaintiff must show a damage arising to himself in particular from the breach alleged. Those of *Kingdon v. Nottle*, 1 Mau. & Sel. 355, and 4 Id. 53, are clear examples. The defendant conveyed to the testator with a covenant of seisin; and the first action was brought by the plaintiff as executrix, upon the idea that such a covenant was broken as soon as entered into, and therefore that, as in other cases of a breach in the testator's time, she ought to sue in that character. But it was held otherwise on demurrer, because, although the warranty was broken in the testator's time, yet the declaration did not show a special damage to him in his life-time, and the heir or devisee took the estate such as it was, and was entitled to the benefit of the covenant; and therefore the executrix could not sue and claim the damages as personalty, since the testator had not so treated the breach of covenant. Lord Ellenborough said there would be a difficulty in admitting the executrix to recover at all, that is, upon the declaration as framed, without allowing her to recover the full amount of damages for the defect of title; and

in that case, the heir would be barred by her recovery; for the heir could not maintain another action for the same breach and the same damages. All the judges, indeed, put it pointedly, that the recovery by the executrix would be a bar to the heir, and leave no subject of a suit for the devisee, although the estate, such as it was, came to him, and the damage was actually to him. Accordingly, when the same plaintiff, in the last case, sued as devisee, there was judgment for her. These cases are contrary to several in this country in one respect; which is, that upon a covenant of seisin, the assignee of the land can not have an action, since the breach is necessarily before the assignment: *Greenby v. Wilcocks*, 2 Johns. 4 [3 Am. Dec. 379], and *Bickford v. Paige*, 2 Mass. 460. That difference does not affect the question before us; and the case of *Kingdon v. Nottle* is a clear authority for this principle, that whenever a person is in the land in privity of estate with the covenantor, eviction or defect of title is not necessarily to the damage of one who has merely a privity of contract; but that such latter person must particularly show his damage, before he can sue on the contract. It further establishes, that the action of the person who has only a privity of contract will not lie, because a recovery in it would be a bar to the person who had the privity of estate, to whom the injury is immediate, and who therefore has the first right to satisfaction.

Upon the whole, therefore, the court is of opinion, both upon authority and reason, that a purchaser with warranty from his vendor may sue upon a covenant of warranty to his vendor; and as a consequence, that the latter can not sue, until he shall have sustained damage by making satisfaction upon his own covenant.

This is the more proper here, since the rule established in this state for measuring the damages; because the plaintiff's intestate ought not to recover his purchase money, but only what Marcum recovered from him; that is to say, the purchase money and interest paid by Marcum: *Williams v. Beeman*, 2 Dev. 483.

The observations on the first point supersede the necessity of examining the question, whether an estate passed by the defendant's deed or not. The declaration is not framed on a covenant to convey, as if this were such an agreement, and not a conveyance; but on this as a covenant of warranty of an estate conveyed. The *gravamen* is the eviction of Marcum, the assignee, and the damages arising therefrom; and not a refusal to

make an assurance. Now the eviction of the intestate's assignee can never, *per se*, be an injury to the plaintiff; but to the assignee alone, until he shall have called on the plaintiff to make him whole. When that shall be done, the plaintiff can state a case in his declaration on which a special damage to his intestate, or to himself as administrator, can be seen and assessed to him.

By Court. Judgment affirmed.

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The principal case is relied on as authority for the positions stated in the following cases. There can be no recovery upon a covenant running with the land by the personal representative of the original covenantee, unless he show in addition damage suffered by him in consequence thereof: *Thrower v. McIntire*, 4 Dev. & B. 379. The original vendee may recover, on breach of such covenant, only in case he has made good the damages to his vendee: *Lee v. Gause*, 2 Ired. 446. A covenant of warranty runs with the land, and upon eviction, such covenant in the deed of any prior vendor may be taken advantage of by the then vendee: *Mills v. Abrams*, 6 Ired. Eq. 456; *Lewis v. Cook*, 13 Ired. 193. The measure of damages for the breach of the covenant of quiet enjoyment is the amount of the purchase money: *West v. West*, 76 N. C. 48.

COVENANTS OF WARRANTY.—A remote assignee may sue upon a covenant running with the land: *Birney v. Hann*, 13 Am. Dec. 167; *Donnell v. Thompson*, 25 Id. 616. An intervening grantee may maintain the action only after he has satisfied his covenant of warranty: *Birney v. Hann*, 13 Id. 167. As to what shall constitute a breach of a covenant of warranty, and what damages may be recovered for the breach, see *King v. Kerr's adm'rs*, 22 Id. 777 and note, wherein the previous cases in this series are collected.

EQUITY CASES  
IN THE  
SUPREME COURT  
OF  
NORTH CAROLINA.

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WARD v. STOW.

[2 DEVEREUX'S EQ. 509.]

DEVISE AND LEGACY TO "HEIRS" OF DIFFERENT PERSONS must be divided among the persons answering the class description *per capita*, not *per stirpes*, where the word "heirs" is used in the will as one of description and purchase.

THE WORD "HEIRS" IS A WORD OF PURCHASE wherever a devise of an estate to "heirs" is not preceded by any prior estate of freehold devised to their ancestors, which may be expanded into an estate of inheritance by the estate left the "heirs."

THE INTERPRETATION OF A TECHNICAL TERM is established by reference to the science or art to which it is peculiar.

BILL to set aside a voluntary division of personal property. The contest arose under the following clause of the will of Nathan Ford, deceased: "It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother John Ford, the heirs of my sister Nancy Stow, the heirs of my sister Sally Ward, and my nephew Levi Ward." John Ford had living, at the death of the testator, four, and Nancy Stow nine children. At the date of the will, Sally Ward was already dead, having left two surviving children, of whom Levi Ward was one. After the death of Nathan Ford, a petition for partition was filed, a decree was thereon rendered, and from that decree an appeal was taken. In the supreme court, the decree below was reversed, 3 Hawks, 604, and a writ of partition was issued from the court, directing partition to be made *per capita*. Upon the



return of the writ, it was set aside, and another issued, directing a division *per stirpes*, and awarding Levi Ward, in addition to his share as representative of his mother, one fourth of the entire lands: 1 Dev. 67. After the first decree, the legatees, under the impression that it conclusively settled the construction of the will, divided amongst themselves the personal property bequeathed them, in accordance with its principles. But after the second decree, this bill was filed to set aside this division, as having been made under mistake.

Winston, for the plaintiff.

Badger and Devereux, contra.

GASTON, J. The inquiries which this case presents are exceedingly unpleasant, but so far as the purposes of justice require, they must be prosecuted to their legitimate result. The first of these inquiries is, whether the division complained of and sought to be reformed, be erroneous or correct? On the part of the complainant it is insisted, that the last adjudication of the court must be regarded as conclusively settling the construction of the will with respect to the real estate, and by necessary inference, fixing its construction also as to the personal property. It is also insisted, that if the interpretation of the will can be considered as open to discussion, the reasons on which that adjudication is founded, completely sustain it. Upon this point the argument is briefly this: that where persons come to an estate as heirs, whether by descent or by purchase, under that description, they take *per stirpes*, and not *per capita*, in a representative character, and not as individuals, and to others must be always considered as an unit, however they may subdivide and parcel out the property among themselves. That if A. dies intestate, seised of lands of inheritance, leaving a daughter, and two daughters of a deceased daughter, his lands descend one half to his daughter and the other half to his grand-daughters, and that if a devise should be made to them, simply as the heirs of A., they must take the estate in the same proportions; that in the first case the canons of descent ascertain the heirs, and direct the disposition of the land, and that in the latter case the will gives to those whom the canons ascertain to be the heirs, and in such proportions as the canons direct. It is thus concluded, from the force of the word heirs, that the persons indicated in the will as the heirs of John, Nancy, and Sally, are to be regarded as the representatives of, and substitutes for, John, Nancy, and Sally, re-

spectively, and taking the same shares as if the land had been given to these persons, and then transmitted to them as the successors of these ancestors; and that a similar result must take place with respect to the personal property; first, because it was obviously the intent of the testator to give both species of property to the same persons in the same way; and secondly, because the word heirs, as applied to personal property, means heirs *quoad* that property, that is to say, those whom the statute of distributions directs to succeed to the personal estate of an intestate.

None can be more deeply convinced than we are, of the necessity of a steady adherence to the decisions of our predecessors. Carelessness in this respect can scarcely fail to involve us in error, and throw the law into confusion. So far as the decisions of these eminent judges concur with each other, they form a law for this court, which nothing short of what we may reasonably hope can not happen, a manifest breach of the law of the land, can warrant us to disregard. Where they are found to conflict, which from the imperfection of all human institutions must sometimes be the case, the latest will of course be presumed right, yet not so conclusively right as to forbid examination. In the present singular case, however, it is somewhat difficult to say, which of the two opposing decisions has the better claims to be regarded as a precedent; for while the one is the more recent, the other has the advantage of having been unanimous; of having been decided upon argument, and of being a judgment in a case regularly and properly before the court. Convinced that we ought not to rely authoritatively and exclusively on the last adjudication, we have deemed it an imperious duty, deliberately to investigate the argument by which it is supposed to be established.

The whole of the reasoning is founded on the effect which the word heirs is supposed to produce in the devising and bequeathing clause. An heir is he who succeeds by descent to the inheritance of an ancestor, and in this, its appropriate sense, the word comprehends all heirs, and the heirs of heirs *ad infinitum*, as they are called by law to the inheritance. This succession is regulated by the canons of descent. According to one of these, the lineal descendants of any person deceased represent their ancestor, or stand in the place in which such ancestor would have stood if living at the time of the descent cast, and it is this taking by a right of representation, which is termed a succes-

sion *per stirpes* or by stocks, the branches taking the same share which their stock would have taken.

From this definition it would seem to follow, that in strictness none can come to an estate as heirs otherwise than by descent. Thus, Lord Thurlow says, in *Jones v. Morgan*, 1 Bro. 209, "all heirs taking as heirs must take by descent." Upon this ground he holds the rule inflexible which requires, that when a freehold is given to one and a remainder is so limited as to go in succession to the heirs of the first taker, these shall take by descent, because "taking in the character of heirs, they must take with the quality of heirs"—that is to say, must take by descent and not by purchase. But an inheritance may be limited in remainder to the heirs of him to whom a precedent freehold is not given, or it may be originally limited to the heirs of a deceased person. Here the donees do not take by descent, for their ancestor has no estate which the word "heirs" can expand into an estate of inheritance. They do not therefore take as heirs, but take simply as purchasers. But it is insisted for the plaintiff, that nevertheless they are described as "heirs;" that the law of descents is necessarily referred to for the understanding of that term and the ascertainment of the persons thereby intended, and therefore this law is to regulate also the shares in which the thing given is to be enjoyed by those on whom it is bestowed. With the highest respect for those who have drawn this inference, we are compelled to say that we do not feel its force. Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions, properly expressed, give the mode and the form that constitute the law of the conveyance. The regulations of the state for the transmission of inheritances left vacant by death do not, *proprio vigore*, operate on the subject-matter of such conveyances, and can apply to them only so far as the parties have adopted them and directed them to be so applied. When a technical phrase is deliberately used, it is reasonable to suppose that it is employed in the sense appropriated to it in the science or art from which it has been taken, and that science or art is very properly consulted for its interpretation. "Heirs" is a well-known term in the law of descents, and when donees or devisees are not otherwise described than as heirs, the law is impliedly referred to for the meaning of the term. But whether these donees or devisees are to take much or little, for a long or a short time, altogether or by moieties, in equal or unequal portions, the law of descents

can give no information; for it has made no provision in relation to these matters, but has left all these to be regulated by the law which the parties may have themselves made in their conveyance.

Is it then a reasonable inference, that the conveyance refers to the law of descents for any such purposes? If there be indeed a settled rule of construction to this effect, it will most cheerfully be followed, but after diligent inquiry, I have been unable to find any traces of its existence. There are indeed some anomalous cases, in which the words "heirs male of the body," and the like, although operating to a certain extent as words of pure description or purchase, have also been allowed to operate as if they were words of limitation and according to the canons of descent. Thus it has been said, that where a limitation is made to the heirs male of the body of B., where no estate is in, or is given to B. himself, though the limitation originally attaches in his heir male under that special description, yet on failure of his issue male, it will go in succession to the other heirs male of the body of B., as if the estate had descended from B. himself. Here the word heirs has a double meaning and a mixed effect. The individuals who first take under this term, take as purchasers, designated by the relation which they bear to a deceased ancestor; but they take an estate which, by the form of the donation, is to pursue the same course of succession to the same extent of duration, and through the same persons as if it had attached to and descended from such ancestor. Such a limitation is of an intermediate description between a descent and a purchase, in point of acquisition having the quality of the latter, as not being derived from or through the ancestor, but in regard to its devolution referable to the former. This and such like cases are considered as *quasi* entails, in regard to which the law is settled, but the principles on which it is settled are not easily discoverable: See Butler's ed. of Fearn, 80-84. How far the position may be true, that persons called to such an estate as heirs, take in a representative character, with the shares or the portions which the canons of descent point out, may be a very curious subject of inquiry, but it can throw little light upon the investigation in which we are now engaged. The term "heirs" has here but a single meaning, and can produce, as we think, but a single effect. It is not pretended nor assumed to be a word of limitation. It directs nothing as to the devolution or succession of the estate after it is vested in the original devisees or

first takers, and its sole purpose seems to be to point them out. An estate not of inheritance, an estate for life, or a term of years, or a chattel, may be limited to persons not otherwise described than as the heirs, or the heirs of the body of a deceased person: and so an estate of inheritance may be limited to persons thus designated, without any attempt to direct its transmission, as in a course of descent from that ancestor.

In the first class of cases, the word heirs is necessarily, and in the last case is obviously, one simply of description, whereby the donor or testator declares under a general term, instead of mentioning by their names, the persons whom he contemplates as donees or devisees of his property. It is a collective term so far only as is every term which may comprehend within it more individuals than one, but it is not collective as calling in the whole succession of heirs to the deceased person. Whenever a descriptive phrase is used in any conveyance, instead of an actual nomination, the import of the phrase must be attended to, in order to find out the persons meant by it. If it be seen that by the term "heirs" those are intended who, at the time referred to, were, or might be, the "heirs" at law of a deceased ancestor, of course the law must be consulted to enable the inquirer to determine who answer to this description, and who, therefore, are these first takers: *Forster v. Sierra*, 4 Ves. 768. But this determined, the sole purpose of the reference is over; and the persons thus ascertained take simply and purely by virtue of the conveyance, in their own persons, not as the representatives of others, precisely as though they had been individually named, or had been described by any other phrase sufficiently explicit to point them out. Thus, in the case of *Mounsey v. Blamire*, 4 Russ. 384, the testatrix, by her will, *inter alia*, devised her real estate to a person whom she described as her kinsman, and who was not her heir-at-law, and directed him to assume her name and arms. By a codicil she gave several pecuniary legacies, and amongst others "to my heir," four thousand pounds. At her death, this legacy was claimed by three persons who were her co-heirs, by her next of kin, and by the devisee of her real estate, as the *hæres factus*. The claim of the devisee was at once rejected by the master of the rolls. In deciding between the next of kin and the co-heirs, he remarked, that where the word heir is used to denote succession, it may be understood to mean such person or persons as would legally succeed to the property, according to its nature and quality; but where it is used, not to denote succession, but to

describe a legatee, and there is no context to explain it otherwise, it must be taken in its ordinary sense. The co-heirs therefore took the property, and there being no words of severance in the will, they took it as joint tenants.

So, if a man makes a gift of gavelkind lands to J. S. and the heirs of his body, and he hath four sons, all these sons shall inherit; but if he make a lease for life to one, remainder to the right heirs of J. S., and J. S. dies, leaving issue four sons, in this case, the eldest only shall have the remainder: *Shelley's case*, 1 Co. 103; Co. Lit. 10; Hob. 31; Dyer, 179, pl. 45. In the first instance, the words heirs of his body, are words of limitation, and call in all who by law can succeed to an estate tail in those lands; but in the last, the words right heirs of J. S. are words of purchase, are descriptive merely, and refer to the law no further than is necessary to explain the description. If the donor, however, had added to these words "in gavelkind—or according to custom," or such like, then all the four sons would have taken, because all would have been included in the description: Hargrave's note to Co. Lit. 10; *Newcomen v. Barker*, 2 Ves. 732. So, if one seised of lands in Borough English, devise to his "heir," the eldest son, and not the youngest, would take; but if he devise to his heir in Borough English, the lands will descend to such youngest son: 14 Vin. Abr. 528, 529; Heir, C, 5, pl. 1, 8. I am forced to conclude, therefore, that when the term heirs is altogether a word of purchase, and simply descriptive of the first takers—where it is not used to denote succession, but to designate persons, those who come under that description take as individuals, and not in a representative character, and of course take *per capita*, unless there be an intent to the contrary apparent on or to be collected from the instrument itself. But it is manifest in this case, not only that the word "heirs" does not denote succession, but that it is not used to designate those whom the law calls "heirs at law." The testator makes a devise of land to his brother John, and thereby recognizes that John was alive at the date of the will. By the phrase "heirs of his brother John," he must then contemplate persons other than those who are in law his heirs, and to give effect to this disposition we are obliged to understand the word heirs in some sense different from its ordinary and legal meaning. It may mean heirs apparent or heirs presumptive.

But in the same sentence we meet with the expression, "heirs of my sister Sally, deceased," and here it may mean heirs at law, but can not mean heirs presumptive or heirs apparent. We

find the same term used in the same sentence to designate persons standing in a certain relation to living persons, and also to dead persons. It can not be interpreted in what is called its technical sense, to mean those who have succeeded by law to the inheritance of their ancestor, because, so interpreted, it would exclude the heirs of his brother John and sister Nancy. *Nemo est hæres viventis*. It can not be interpreted in the sense sanctioned by custom, of heirs apparent or heirs presumptive; that is to say, of those who will probably inherit from a living ancestor, for then it would not embrace the heirs of his sister Sally. Besides, the term is used in reference to the gift of personal as well as of real property. Heirs, heirs apparent, heirs presumptive, ordinarily indicate those who have or expect a claim on the lands of another, by reason of their connection with him; but those who acquire personal property on the death of its possessor, or look forward to its acquisition upon his death, are generally termed his relations or his next of kin. The word is used in some sense sufficiently comprehensive to take in all the objects of his bounty, and employed in relation to both species of property. Individually, I am quite satisfied that the testator means by it "children," and I think we have this exposition given by himself in the preceding sentence, where he directs the land devised to his brother John for life to go upon his death "to his brother John's children." But the court does not decide this to be its meaning. We decide only that it does not mean heirs properly speaking, nor heirs apparent, nor heirs presumptive. It is unnecessary to determine whether it means children or issue, for upon either interpretation the same result will follow. There is no reference expressly or impliedly to the canons of descent, or to the statute of distributions; not even for the purpose of ascertaining the first takers of the property, and still less for fixing the proportions in which they shall take it. An improper term has been used by the testator, and in order to effectuate his intention, we are bound to give the will the same construction as though he had used the appropriate expression. If by "heirs" he meant children or issue, we are to read the will as if it were written children or issue. It may not be amiss to quote a strong case in illustration of this doctrine, although it seems reasonable enough to stand without authority. In *Doe on dem. Hallen v. Ironmonger*, 3 East, 533, lands were devised to a trustee, to receive and pay the rents for the maintenance of Sarah Hallen, a *feme-covert*, and the issue of her body, during her life, and after her decease for the use of the

heirs of her body, and their heirs and assigns forever, without regard to seniority of age, or priority of birth, and in default of such, to the right heirs of the testatrix.

Sarah Hallen enjoyed the premises during life, and had issue, one son and two daughters. The son died before the mother, leaving the lessor of the plaintiff, his son and heir-at-law, and also four other children. On her death, this ejectment was brought against her surviving daughters, and the question was, whether the plaintiff was entitled to recover any, and if any, what part of the premises? It was admitted that no estate of inheritance passed to Sarah Hallen, for that the legal estate during her life was in the trustee; but it was insisted, first, that a legal contingent remainder was limited to such person or persons as should be the heir or heirs of her body at the time of her death, under which description the eldest son was entitled to the whole; and secondly, if the court thought that heirs of the body meant children, then such children would take as tenants in common, and the lessor of the plaintiff was entitled to a third. It was urged upon the last point, that the qualifying expressions, "without regard to seniority of age, or priority of birth," meant only that all the children should take equal portions; those who came *in esse* last as well as first; that the word "heirs" was sufficient to sever the estate; and that it was plain that all were meant to take alike, which could not be without taking as tenants in common. But the court, stopping the counsel for the defendants, held that the phrase, "without respect to seniority of age, or priority of birth," annexed to the words heirs of the body, conclusively indicated that these were words of purchase, and meant children; and secondly, that as there were no words of severance used, they took as joint tenants, and the father of the lessor of the plaintiff having died before severance, the whole vested in the surviving children, the defendants.

We are brought then irresistibly to the conclusion, that the word "heirs," as used in this will, has not the peculiar operation which has been attributed to it, and that the persons whom the testator designated by this expression must take the shares, whatever they may be, which the will assigns to them, in the same manner as if they had been pointed out by any other and more appropriate terms. The will declares, that the property given to these persons shall be equally divided, and the only question that remains is, between whom is this equality directed? Is it between the classes, or is it between the individ-



uals of which the classes are composed? Adopting the language of Chief Justice Taylor upon the first adjudication (3 Hawks, 606), we think that "there has been a settled construction upon all devises and bequests of this description, recorded in a series of decisions to be traced back for more than a century," which leaves us no liberty to speculate on this question. It can scarcely be necessary to swell the list of authorities to which he has appealed, and which clearly sustain his position. We will add only the following cases to the very strong ones which he has enumerated.

In *Davenport v. Hanbury*, 3 Ves. 257, a legacy was given to A. or her issue. A. died before the testator, leaving a son and two grandchildren, the children of a deceased daughter. It was held that the word issue included grandchildren, and that the son and grandchildren all took as joint tenants, but that, had the word "equally," or the words "equally to be divided," been inserted, they would all have taken *per capita*. "As there are no words of severance, nor anything to show that they were intended to take, not in their own rights but as representing others, the son and the children of the deceased daughter must be considered as *personæ designatæ*, and will take as joint tenants." In *Barnes v. Patch*, 8 Ves. 604, there was a devise of real and personal estate, to be equally divided "between my brother Lancelot's and sister Esther's families;" it was held that the children of Lancelot and Esther took exclusively of their parents, and all took equally *per capita*. In *Lincoln v. Pelham*, 10 Ves. 166, the testatrix bequeathed one fourth of her personal estate to the younger children of a daughter A., a fourth to the younger children of a daughter B., a fourth to the child or children of a daughter C. (upon and after the death of said C.), and the remaining fourth to the child or children of a daughter D., upon and after her death, and directed that if either of the last mentioned daughters should have no child living at her death, the part allotted to her child or children should go to the child or children of the other, and if both of them should die and leave no child as aforesaid, then these two fourths should be equally divided amongst the younger children of her daughter A., and the younger children of her daughter B. The daughters C. and D. both died unmarried, and it was held that these two last mentioned fourths were to be distributed among the younger children of A. and B. *per capita*.

The result of our inquiries is a full conviction that the last adjudication of the court upon this will was wrong, and that

the first was right; and as there is no doubt but that the personal and real estate are given to the same persons and in the same shares, the error which the plaintiff complains of in the division of the personalty, and which it is the purpose of this bill to reform and correct, does not exist.

We are therefore all of opinion, that the plaintiff's bill must be dismissed, but for obvious reasons, it is to be dismissed without costs.

By COURT. Order accordingly.

This case is cited in the cases below as supporting the points mentioned.

Where the words "heirs," "grandchildren," or the like, are used as words of description merely, the persons answering to the description take *per capita*, not *per stirpes*: *Brant v. Scott*, 1 Dev. & B. Eq. 155; *Hobbs v. Crage*, 1 Ired. 332; *Cheeves v. Bell*, 1 Jones Eq. 237; *Harris v. Philpot*, 5 Ired. Eq. 328; *Bivens v. Phifer*, 2 Jones Law, 439; *Roper v. Roper*, 5 Jones Eq. 16; *Burgin v. Patton*, Id. 425; *Grandy v. Sawyer*, Phillips Eq. 10; *Tuttle v. Puitt*, 68 N. C. 544.

There are, however, certain restrictions upon the generality of this rule, laid down by certain of these cases; thus, if the devise be to the testator's own heirs, the heirs take *per stirpes*, not *per capita*: *Burgin v. Patton*, 5 Jones Eq. 427; so if there be anything in the will indicative of the intention of the testator, that the persons described in a class shall take as an unit, then the division shall be *per stirpes*, not *per capita*, as where construing that the division shall be made *per capita*, would require a new division of the property every time that a child should be born in any one of four families: *Roper v. Roper*, Id. 16; laying down similar restrictions: See *Bivens v. Phifer*, 2 Jones Law, 439.

WHEN THE WORD HEIRS is taken in its legal acceptance and not as *descriptio personarum*: *Den v. Barnes*, 6 Am. Dec. 547.

## MARSH, EX'R OF SCARBORO, v. SCARBORO ET AL.

[2 DEVEREUX Eq., 551.]

AN EXECUTOR CAN NOT COMPEL LEGATEES TO REFUND the value of legacies delivered to them because the assets of the estate have proved insufficient to discharge its liabilities, unless he show in addition that the deficiency was caused by debts of which there was no notice at the time that the legacies were delivered, or by subsequent depreciation of the assets retained from unforeseen casualty.

BILL praying that defendants be compelled to reimburse plaintiff sums by him paid out in discharge of debts of his testator. The ground upon which the relief was claimed was, that plaintiff, as executor, had delivered over to defendants, who were specific legatees, their legacies, at a time when, as alleged by him, he was of the impression that the assets retained by

him were amply sufficient to discharge the debts of the estate; but that debts presented in the course of administration had exhausted these assets, and compelled him to advance the monies with which he now sought to charge defendants. The other facts appear in the opinion.

*Nash*, for the plaintiff.

*W. H. Haywood and Waddell, contra.*

GASTON, J. The plaintiff has not made out a case which, according to the rules of this court, entitles him to relief. When an executor has voluntarily paid legacies, he is not in general permitted to institute proceedings against the legatees to refund. As it is his folly to make such payments before the amount of the estate can be ascertained, or his negligence in not acquainting himself with its amount, when that information may be obtained, neither of these grounds will entitle him to the interference of this court, and for that purpose subject the legatees to the inconvenience of an account of the administration of the assets. There are certainly, however, excepted cases, in which the executor can demand this relief. If debts be afterwards made to appear, of which debts there was no notice when the legacies were paid; or if any casualty which could not have been reasonably anticipated has, without fault or negligence in the executor, destroyed what was kept for the payment of the debts—these matters arising subsequently to his settlement with the legatees, may give him an equity to call on them to refund what he needs for the satisfaction of creditors. But then the matters constituting this equity must be distinctly set forth in his bill, for obvious reasons. One is, to show the right of the plaintiff to have what he asks of the court; and another is, to enable the defendants to put in issue the matters upon which that right depends.

The bill in this case is wholly insufficient. It sets forth no accident which has destroyed the estate or impaired the value of the assets, and it does not charge what debts, if any, have been demanded since the payment of the legacies, of which the executor then had no notice. Had the bill, however, been sufficient, no relief could be given, unless its material allegations were either admitted or proved. Here the statement in the bill, vague as it is, that the amount of debts exceeded the assets retained by the executor, is wholly denied; the presumption of the law is against it; and there is no evidence of any sort to support the allegation or to contradict the presumption.

The bill must be dismissed, and at the costs of the plaintiff. As it is possible, however, that the plaintiff may have rights which can be shown on a proper bill, this dismissal is directed to be made without prejudice.

By COURT. Bill dismissed.

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EXECUTOR MAY RECOVER BACK from overpaid legatees, if without his fault the assets prove insufficient to pay all the legacies charged thereon: *Gallego's executors v. Attorney-general*, 24 Am. Dec. 650; but see *Davis v. Newman*, 2 Rob. 664, cited in the note to that case, and which lays down the doctrine as in the principal case.

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## JOHNSON v. CAWTHORN.

[1 DEVEREUX & BATTLE'S Eq. 32.]

THE EXISTENCE OF THE VENDOR'S LIEN on land for the unpaid purchase money, even as between vendor and vendee, is in this state not yet settled.

SUCH LIEN CERTAINLY DOES NOT EXIST as against creditors of the vendee, enforcing their debts, nor as against purchasers at execution sale, who bought with notice that the purchase price of the land was not yet paid.

BILL to enforce a vendor's lien. The land had been sold to Robert Johnson, on credit. Robert Johnson soon afterwards died, and thereafter the county court directed this land to be sold, at the instance of the guardian of Johnson's minor children. At the sale, defendant purchased with knowledge that a portion of the purchase money of the land was yet due, and that plaintiff looked to the land as security. The decree below established plaintiff's right to a lien upon the land. Defendant appealed.

*Attorney-general*, for the defendant.

*Badger*, contra.

GASTON, J. We have delayed the decision of this cause, in the hope of being able, with satisfaction to ourselves, to settle questions of great public interest involved in it; viz.: the existence in this state, and if it exist, the extent of the rule, that the vendor of land has a lien thereon for the unpaid purchase money. The case of *Wynn v. Alston*, 1 Dev. Eq. Cas. 163, has been generally considered as establishing that the vendor here has a lien against the vendee, and against volunteers and purchasers under him with notice, and that it was so established by the adjudication of Judge Hall and Judge Henderson against

the dissenting opinion of Chief Justice Taylor. From the published report it appears, that Judge Hall and the chief justice respectively filed opinions, and as none was filed by Judge Henderson, and as it was known that the decree for the plaintiff could not have been rendered without his sanction, it was a natural inference that he concurred for the reasons stated by Judge Hall. It was known, however, to some of the individuals who now constitute the court, that there is reason to doubt whether this inference be correct. Some years after the decision of *Wynn v. Alston*, there came on for hearing the case of *Kelly v. Perry*, in which the plaintiff set up the lien, and founded upon it her claim to relief. In the argument the defendant's counsel admitted the general doctrine of the vendor's lien, as supposed to be established in *Wynn v. Alston*, but contended that it did not apply to the case then under consideration. Judge Henderson remarked from the bench, that the rule was not established in that case, as supposed, for that although he concurred with the decision, his judgment had rested upon other grounds than those taken by Judge Hall. The bill in *Kelly v. Perry* was dismissed, and the judgment of the court, as delivered by Judge Hall, seems to admit that the rule was not yet settled. "How far (I take the words from the opinion) the vendor of land has a lien on the purchase money in the hands of the purchaser from the vendee with notice, need not be the subject of examination in this case, because it does not appear that anything was due from Taylor (the vendee) to the plaintiff as part of the purchase money." Under these circumstances, we were solicitous to examine the record in *Wynn's case*, to see the allegations, the proofs, and the decree, and thus satisfy ourselves what were the points authoritatively decided by it. But with every exertion on our part, and on the part of the officers of the court, we have been unable to do so. In the conflagration of the state-house, the books and papers of the clerk's office were saved as they could be—in much hurry and confusion; and although it is believed that none were actually destroyed, yet they were so scattered, that one book of our records and the original papers in some of the suits are yet missing. A hope is indulged, that these will yet be obtained, but we do not think ourselves justified in postponing any longer on that account, the decision which the parties to this controversy have a right to require.

On the general question, whether this doctrine of lien ought to be considered as a part of the equity jurisprudence of North

Carolina, we all of us feel the force of the argument in the dissenting opinion of Taylor, C. J. It is difficult to resist it, especially when we see the "inconvenient state," to adopt the language of Lord Eldon, in *Mackworth v. Simmons*, 15 Ves. 350, in which this doctrine, after all the corrections and improvements it has received in England, has ultimately placed the titles to lands in that country. Whether there be or be not a lien; whether the purchaser from the vendor be or be not liable for the original purchase money, is not there a "dry question," depending upon the existence or non-existence of any fact, but depends upon the peculiar circumstances of each case, accordingly as these circumstances may induce the court to infer, either that the lien was intended to be reserved to the vendor, or that credit was given, and exclusively given, to the vendee. A doctrine leading to such results ought to be well considered before it is adopted, or if already adopted should, if possible, be well guarded, lest it should be followed by the same consequences. But upon this question, the rules by which it is our duty to be guided are exceedingly different, accordingly as the doctrine may or may not have been sanctioned by our predecessors. An adjudication by them is a precedent which we are bound to regard as evidence of the law, unless it can be conclusively shown to be erroneous, and by which we must be guided, even when so shown, if a departure from it occasions greater public inconvenience than the error itself. Where there is no such precedent, we then ascertain the true rule by the deductions of reason from settled principles. After several conferences, we are unable to agree upon this general question, and as a determination of it is unnecessary in the present case, we must leave it, reluctantly leave it, in the state in which we find it.

If we should attempt to decide this case (supposing the doctrine of lien to exist here) by Lord Eldon's rule—drawing from the peculiar circumstances of the transaction an inference that the lien was intended to be reserved to the vendor, or the opposite inference, that credit was intended to be given exclusively to the vendee—it is questionable, at least, whether there would be more harmony in opinion than there is on the general question.

There is, however, one point in the case upon which there is no difference of sentiment among the members of the court. Whatever may be the lien as between vendor and vendee, or between vendor and volunteers or purchasers with notice under

the vendee, we deny its existence against creditors enforcing the collection of debts by legal process. If a vendor claiming such a lien will not reduce it to a legal form, and give it the notoriety of registration, which our laws require for the validity of legal liens, it can not prevail against creditors. Purchasers under execution sales represent creditors, and buy all that the creditor has a right to sell. The purchaser in this case is to be considered as a purchaser under a sale by execution. The sale was made by order of the court, under the fifth section of the act of 1789, for the satisfaction of creditors, and the proceeds thereof are assets in the guardian's hands for the benefit of creditors, and the purchaser at such a sale necessarily represents these creditors.

The plaintiff is evidently not pursuing these assets, as she has not filed her bill against the vendee's heirs for any surplus after paying debts, but against the purchaser at the judicial sale. She asks that the sale so made in order to satisfy creditors should be declared null, so far as it affects her equitable lien upon the thing sold. This would be in effect to set up such a lien against creditors.

The decree below is to be reversed, and the plaintiff's bill dismissed, with costs in both courts.

By COURT. Decree below reversed.

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*Wynne v. Alston*, 1 Dev. Eq. 163, was the first case involving the doctrine of vendor's lien that arose in North Carolina. The facts to be gathered from the report are these: Plaintiff had conveyed a parcel of land to Jeffreys, taking his bonds for the purchase money. Jeffreys afterwards conveyed to a prior creditor, Outerbridge, to secure his debt. Outerbridge then conveyed to defendant, who took with notice that plaintiff had not been paid the price of the land. The prevailing opinion, that delivered by Judge Hall, decided that under the circumstances, plaintiff could look to the land as security, working out the result through an application of the doctrine of vendor's lien. It would seem, however, from what is said in the principal case, that there were other facts existing, which, in the opinion of the concurring justice, Judge Henderson, justified the result, even though the doctrine of vendor's lien was not looked to. No opinion as to what were these facts can be gathered from the bald report of the case. Taylor, C. J., dissented.

Of course, these facts would tend to weaken the authority of *Wynne v. Alston*; but if they be overlooked, and the case be considered as one which of necessity demanded the court to pass upon the question as to the existence in North Carolina of the vendor's lien, then the case has been since overruled.

In *Norfleet v. Cotton*, 1 Dev. Eq. 334, it was held that the lien on the land did not exist in favor of a vendor of a term of years to secure him his unpaid purchase-money. The next reported case involving the question was the principal, which can not be considered as other than greatly shaking the authority of *Wynne v. Alston*. In *Harper v. Williams*, 1 Dev. & B. Eq. 379, the principal case was followed to the point, that the vendor has no equitable

lien as against the vendee's creditor who proceeds to a sale by execution. In *Crawley v. Timberlake*, 1 Ired. Eq. 348, it was said that it was not yet settled whether this lien here existed, even as between vendor and vendee.

This state of uncertainty was soon resolved by *Womble v. Battle*, 3 Ired. Eq. 182, in which the whole doctrine of vendor's lien is, as far as this state is concerned, entirely exploded. The court, in arriving at their conclusion, relied somewhat upon the principal case, *Ruffin, C. J.*, stating, that had the case required it, he and Judge Gaston would have overturned the doctrine in it, but had refrained from passing on the point, because it was not absolutely necessary to the determination of the suit, and because of their knowledge that Judge Daniel disagreed with them. The question may now be considered at rest in North Carolina, as the authority of *Womble v. Battle* has been repeatedly reaffirmed: See *Henderson v. Burton*, 3 Ired. 262; *Cameron v. Mason*, 7 Ired. Eq. 180; *Simmons v. Spruill*, 3 Jones Eq. 9; *Blevins v. Barber*, 75 N. C. 438.



CASES  
IN THE  
SUPREME COURT  
OF  
OHIO.

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**BROWN v. MANNING.**

[6 OHIO, 238.]

**DEDICATION BY THE OWNER TO A PUBLIC USE, OF LANDS** which are used for the object contemplated by him, inures as a grant, and the existence of a grantee is not essential to its validity.

**ACCEPTANCE OF SUCH LANDS, AND THEIR USE BY THE PUBLIC** for the object intended, works as an estoppel *in pais*, precluding the donor and all claiming in his right from asserting any ownership inconsistent with such use.

**ACKNOWLEDGMENT AND RECORDING OF TOWN PLAT** transfers the fee of land thereon dedicated to public use to the county, and secures its use to the purposes designated on the plat.

**AUTHORITY OF AGENT TO LAY OUT PLAT OF TOWN** is proved by the ratification of the proprietors, evidenced by their laying out the streets and numbering the lots in accordance with the plat, and by their referring to it in their deeds as the "recorded town plat."

**INHABITANT OF A TOWN, LIVING AND HOLDING PROPERTY** contiguous to a public square, may maintain a suit to declare the title to such square, and to have buildings erected thereon abated as nuisances.

**BILL** in chancery, reserved in Miami county. The plaintiff is the owner of two lots in the town of Piqua. The defendants are the heirs of one of the original proprietors of the land. In 1807 the town of Piqua was laid out by the proprietors, and a plat of it made, subscribed, acknowledged, and recorded by one Brandon, their agent. It was proved that the proprietors had conveyed lots, describing some of them as "lying adjoining the 'public square,' and as numbered according to the recorded plat of the town in the recorder's office." The land

remained, until lately, uninclosed and used as a common. The defendants are now asserting title to the land, have sold a part, and caused buildings to be erected on it. The object of the bill is to declare the title, and to cause the erections to be abated as nuisances. The answer admits the proprietorship and the laying out of the town, but denies the authority of Brandon as agent, and avers that the land in question was designed for county buildings, and that, when all hope of Piqua's becoming the county seat was destroyed, the defendants entered and held possession, claiming title.

*Crane and Schenck*, for the plaintiff.

*Grosvenor*, for the defendant.

By Court, LANE, J. The subject of appropriations for public purposes, has of late been frequently under the consideration of courts in our country; and it is now well settled, that where lands are dedicated by the owner to any lawful use, public, pious, or charitable; and are used for the object, and in the manner contemplated by the owner, it inures as a grant: *Cincinnati v. Hamilton Co.*, 7 Ohio, 96. The existence of a grantee, is not essential to the validity of such dedication: *Bryant v. McCandless*, 7 Id. ii, 135. Nor is any particular form of words necessary to give it effect. If accepted and used by the public in the manner intended, it works an estoppel, *in pais*, precluding the donor, and all claiming in his right, from asserting any ownership inconsistent with such use: *Town of Pawlet v. Clarke*, 9 Cranch, 292; *McConnel v. Town of Lexington*, 12 Wheat. 582; *Beatty v. Kurtz*, 2 Pet. 566; *Cincinnati v. White*, 6 Id. 432; *Rex v. Lloyd*, 1 Camp. 262; *Price v. M. E. Church*, 4 Ohio, 547; *Heirs of Reynolds v. Commissioners of Stark*, 5 Id. 204; *McBride v. Hueston*, 6 Id. 101; *Lade v. Sheperd*, 2 Str. 1004; *Jarvis v. Dean*, 3 Bing. 447.

It is not unusual for appropriations to be made for some purpose evidently public, where, from the want of certainty, it is difficult to learn the precise object. To ascertain this object, in this case, the parties attempt to discover the intention of the owners of the town. With this view, the plaintiff proves declarations by them, that they intended to provide a site for a court-house, if wanted, and if not needed for that purpose, the square to remain open for the town; while the defendants attempt to prove that they designed, if no court-house should be erected upon it, either to resume it, or appropriate it to some seminary of learning. No such uncertainty rests on the case

before us; for the acknowledgment and record of the town plat (which is the act of dedication, and which, by the operation of the second section of the statute of 1805, for the recording of town plats (reprinted Stat. Ohio, 22, 301), transfers the fee of the land to the county, and secures its use to the purposes designated on the plat), sufficiently defines the object of the grant; and no declarations or presumed intentions of donors, can divert it to a different purpose.

It is clear, that Brandon's agency was authorized by the proprietors, for they have ratified it in various ways. They have adopted his numbers of the lots; they refer to his plat in their deeds as the "recorded town plat;" they bound some of the lots on the "public square," and the town has been occupied in conformity with this plat for twenty-five years. There is no higher evidence of the public appropriation of the streets and alleys of the town than of the square.

The present case is plainly different from any heretofore decided by this court. In *Heirs of Reynolds v. Commissioners of Stark*, 5 Ohio, 204, the donation was for "county buildings." In *Smith v. Heuston et al.*, 6 Id. 101, the object of the donation was for "public buildings for the inhabitants of the county of Butler." By these grants, estates were vested in the county, as a municipal corporation, and became their absolute property. Here the land was set apart as a "public square," the use is raised and defined, *ex vi terminorum*, essentially for the benefit of the inhabitants of the town; the due enjoyment of which will be secured by a court of chancery: 4 Ohio, 547; 5 Id. 204.

Objections are raised to administering this remedy at the instance of these parties, and we are referred to the opinion of the court in one of the above cases, 6 Ohio, 102, in which it is said, that "rights purely public, are to be enforced in the name of the state, or of its acknowledged agents." In that case the injury, if any, was done to the county, which should be repaired in a suit in its name, and at the instance of the proper officers; but the remedy was denied to those plaintiffs, because they were volunteers only, having no individual interest. The judge, however, proceeds in the report to show that that bill could not be sustained under the well-established principles applicable to the case before us, that one commoner may prefer his suit to sustain the common interests: *Beatty v. Kurtz*, 2 Pet. 585 (566); Mitf. Pl. in Ch. 145; *Brown v. Vermuden*, 1 Ch. Cas. 272; Coop. Eq. 41; *Mayor of York v. Pilkington*, 4 Atk. 284; and that one creditor, *Leigh v. Thomas*, 2 Ves. 312; 28 (18) Id. 78; *Hendricks v.*

*Robinson*, 2 Johns. Ch. 296; *Grosvenor v. Austin*, 6 Ohio, 112; one legatee: *Thompson v. Brown*, *Brown v. Rickets*, 4 Johns. Ch. 303, 619 [8 Am. Dec. 567]; *Brown v. Rickets*, 3 Johns. Ch. 553; *Sherril v. Birch*, 3 Brown Ch. 229; or one of a great number interested, under peculiar circumstances, and for convenience, representing the whole: *Lloyd v. Learing*, 6 Ves. 779; *Adair v. New River Co.*, 11 Id. 429; Prec. in Ch. 592; *Palk v. Clinton*, 12 Ves. 542 (58), may litigate for the benefit of all: Story Eq. Pl., secs. 88, 147, 165, 203. This bill is not skillfully drawn, yet it sufficiently appears that the plaintiff is one of the inhabitants of the town, living and holding property contiguous to the square, the value of which is affected by the dedication. He is therefore not a volunteer, assuming to protect the rights of others: but entitled to this remedy for the protection, both of his individual and of his common interests. Case remanded to the county, to settle the terms of the decree.

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DEDICATION OF LANDS TO PUBLIC USE.—See *State v. Catlin*, 23 Am. Dec. 230; *Abbott v. Mills*, Id. 222, note 230.

PRIVATE ACTION FOR PUBLIC NUISANCE.—See *Abbott v. Mills*, Id. 222; *Lansing v. Smith*, 21 Id. 89, note 102.

The principal case is cited in *Kittle v. Pfeiffer*, 22 Cal. 489, to the point that where a dedication to a public use is made by grant or conveyance, it is valid, even though there be no grantees *in esse* at the time, to whom the fee could be conveyed; and in *Green v. Oakes*, 17 Ill. 252, to the point that a dedication will be presumed from twenty years' user and acquiescence by the owner.

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## McCoy's ADM'RS v. BIXBEE'S ADM'RS.

[6 OHIO, 310.]

COVENANT TO CONVEY, CONSTRUCTION OF.—Where one party to a contract, in consideration of the other party's undertaking to pay him for a tract of land, covenants to convey the land to such party, without naming any time for performance, the payment of the money, not the promise to pay it, is the real consideration for the promise to convey; and in an action on such covenant the plaintiff must aver either that he paid the money, or that he has tendered, and is ready and willing to pay it.

COVENANT reserved in the county of Delaware. The opinion states the case.

*Wilcox*, for the plaintiffs.

*Swan*, for the defendants.

By Court, WRIGHT, J. The points raised by the demurrer make it necessary for us to construe the covenant between these

parties. Bixbee, in consideration of McCoy's undertaking to pay him for a tract of land, covenanted to convey to him the land, without mentioning any time for the conveyance. McCoy stipulated to pay one half the purchase money on demand, and the remainder in five years, with interest after eighteen months. The common-sense construction of this contract in the opinion of the court, is the legal one. Bixbee did not manifest a clear intention to convey away his land to another, and rely upon the mere promise of the person he conveyed to, to pay him for it. Such a contract or intention would be so manifestly against his interests, and the common and usual mode of selling land on credit, that the presumption is against it, and clear expressions are required to authorize such a construction. The consideration of the covenant to convey is said to be the promise to pay by McCoy. We think this too narrow a construction. The performance by McCoy of his covenants, the payment of the money, was the only real substantial consideration of the promise to convey by Bixbee. To determine otherwise seems to us the substitution of the shadow for the substance: *Dustin v. Newcomer*, 8 Ohio, 51. Mere words should be construed according to the evident intention of the parties using them: *Courcier v. Graham*, 1 Id. 341; *Clermont v. Robb*, 5 Id. 493. Why did these parties omit to fix the time for making the deed? Evidently in order to entitle McCoy to the deed whenever he paid his money. He had the option of a credit for the whole purchase for five years, unless Bixbee demanded one half of it before. It would be unreasonable to construe this so as to compel Bixbee to convey away his land without being paid for it, and to rely upon the mere promise of his grantee to pay; and being unreasonable, we can not suppose it was his intention so to contract. As we understand the law applicable to such contracts, it gives no force to technical constructions when opposed to the intention of the parties.

It follows from our opinion, that if McCoy, the plaintiff, would show a good title to sue on the covenant of Bixbee, he must aver either that he has paid the money, or that he has tendered, and is ready and willing to pay. That is the condition of the contract upon which the right to sue depends. The absence of such averment in either count of the declaration is a fatal objection. The demurrer is sustained.

## MCGREGOR v. KILGORE.

[6 OHIO, 358.]

**LIABILITY OF COMMON CARRIER.**—The relation of common carrier continues from the time of the shipment of goods until their delivery at the point of destination, unless such relation has been interrupted by some act of the consignor or owner; but a privilege, given to him in the bill of lading, of reshipping the goods in case of low water, does not release him from his obligation to deliver safely, and he is liable for any injury caused to the goods during such reshipment.

**MEASURE OF DAMAGE FOR INJURY CAUSED BY NEGLIGENCE OF CARRIER** is the value of the goods at the place of delivery.

**CASE** upon a bill of lading; adjourned in Hamilton county. The goods were consigned to the plaintiffs and shipped on board the steamboat Chesapeake, to be delivered at Cincinnati. The damage to the goods arose from the cask in which they were packed slipping away from the workmen and rolling into the river. The letter referred to in the opinion was written to the defendant by the plaintiffs, who requested him to retain the goods for lower freight. The other facts sufficiently appear from the opinion. There was a special verdict for the plaintiffs.

*Haines*, for the defendant.

*Storer*, for the plaintiffs.

By Court, WRIGHT, J. It was not contended on the trial before the jury, nor is it now insisted, but the water in the Ohio river was so low when the Chesapeake arrived at its mouth, as not to admit of her proceeding to Louisville. There was no dispute then, nor is there any now, that the letter in evidence was written by the plaintiffs to the defendant, and received by him at Trinity, after the goods were landed there. I therefore take these two facts as a part of this case, though not included in the finding of the jury.

The bill of lading was a contract to carry from New Orleans to Cincinnati, and deliver to the plaintiffs there in good order, with privilege to the carrier, in case of low water, to re-ship for Louisville in some other craft, and charge the increased expense of such reshipment to the consignee. The first point presented, it appears to us, is, did the landing of these goods at Trinity in order for their reshipment, put an end to the defendant's connection with them as carrier, under the contract, and convert him into a warehouse-keeper and forwarder? There seems no necessity for inquiring into the custom of the river, when goods are transhipped, to land and protect them by

temporary warehouses, if none other can be had, until suitable craft arrive to take the lading up the river.

The bill of lading gave the carrier the privilege of forwarding the goods on other craft than that in which they were shipped in one event, and it seems to us the right to land may be conceded as incident to the reshipment, without at all affecting the questions before the court. It was but a privilege to the carrier, in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of the freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at their destined port, and delivery: *Whitesides v. Russell*, 8 W. & S. 44; *Dunselth v. Wade*, 2 Scam. 285; Angell on Carriers, 227; unless that relation has been interrupted by some act of the owner or consignee. In that possible view of the case, the letter alluded to was read in evidence. It is now claimed that the letter constituted the defendant the agent of the plaintiffs, and put an end to his duties as carrier. There is nothing in the case, and there was no evidence on the trial, to show that this letter was received by the defendant before the accident to the goods. If, therefore, the receipt of the letter was admitted to affect what the defendant urges, a state of things is not shown in this case, in which the letter can bear upon the injury. The utmost that could be claimed for this letter, if received before the injury, would be to exonerate the carrier from injury, while the goods were detained, under the letter, for lower rates of freight. It can not reach back to influence an injury, which the goods received immediately after they were landed, and before the letter was received or perhaps written. The defendant had these goods, as carrier, when they were injured, and is subject to the law of carriers. "A common carrier warrants the safe delivery of goods in all, but the accepted cases of the act of God and public enemies:" *Elliott v. Russell*, 10 Johns. 7; [6 Am. Dec. 306]. A carrier, in taking freight, is bound to use sound and proper hands, and machinery, for lading and unlading, and the safe handling and removing the goods; and if loss ensue from the failure in any particular, the carrier must bear it: *Abbott*, 259; *Goff v. Clinkard*, 1 Wils. 282; 1 Doug. 278. The injury in this case resulted from the want of machinery to remove heavy articles, or the carelessness, inattention, or want of strength in the hands employed.

It remains, then, only to inquire into the proper rule of dam-

ages in the case. The goods were delivered in Cincinnati in an injured condition. The carrier earned full freight for their transportation. It would seem to be the dictate of natural justice, that the person liable for their safe delivery, should make good to the owner the injury they sustained while under his care and control. The owner was entitled to the goods at Cincinnati in their perfect state. But for the act of the defendant, he would have had them in that condition. The carrier, in case he deliver goods at the port of delivery, earns and is entitled to demand full freight, notwithstanding they have been partially injured, and the consignee must look to his bill of lading for indemnity.

In New York the rule is established, that the measure of damage is the value of the goods at the port of delivery: *Amory v. McGregor*, 15 Johns. 38 [8 Am. Dec. 205]; *Bracket v. McNair*, 14 Id. 171 [7 Am. Dec. 447].

The supreme court of Pennsylvania, upon full examination, held it best to remove from the carrier all temptations to fraud, and that was best done by making him liable for the value of goods lost at the place of delivery; and established that as the rule of damages in such cases, founded upon authority, general convenience, and good policy: *Gillingham v. Dempsey*, 12 Serg. & R. 186; Sedg. on Damages, 370; Angell on Carriers, sec. 483; 2 Kent Com. 600, where the following cases are cited: *Oakey v. Russell*, 18 Martin's Louis, 62; *Brandt v. Boulby*, 2 Barn. & Adol. 932; *Warden v. Greer*, 6 Watts, 424; *O'Conner v. Forster*, 10 Id. 418; *Wallace v. Vigus*, 4 Blackf. 260; *Arthur v. Schooner Cassius*, 2 Story Cir. Ct. 81. These authorities are not shaken by those cited by the defendant. We think this obviously the rule of law and justice. The jury have returned two valuations, looking to this point.

1. The value, adding sixty per cent. to the sterling cost, as the usual mercantile estimate in Cincinnati, to cover the charges, freight, and insurance from Liverpool.

2. The actual value of the goods in Cincinnati, deducting therefrom the proceeds of the goods, sold in their injured condition.

Which of these furnishes the rule of damages, is the question. The first is the usual mode of ascertaining the net cost of such goods in Cincinnati. In the absence of other evidence, that would be taken as the value of the goods. But when the actual value is found, the supposed or presumed value yields. That is the case here; the jury have assessed the damages, as



predicated on the actual, as well as the supposed value; the actual value measures the real injury, and is the rule of damage.

Judgment for the plaintiff for that sum with interest.

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LIABILITY OF COMMON CARRIER.—See *Daggett v. Shaw*, 25 Am. Dec., 439, and note 442, where the other cases in this series on the subject are collected.

The principal case is cited in *Walsh v. Steamboat H. M. Wright*, 1 Newb. 496, to the point that money, not exceeding a reasonable amount, carried with a passenger, may be included under the term baggage.

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## SAUNDERS v. STOTTS.

[6 OHIO, 380.]

PLEA THAT SEALED NOTE WAS OBTAINED BY FRAUD, COVIN, and misrepresentation is good on demurrer; and fraud may be specially pleaded in bar, without averring the acts constituting the fraud, even where evidence thereof might be given under the general issue.

DEBT. Adjourned from the county of Franklin. The opinion states the case.

*Starling and Gilbert*, for the plaintiffs.

*Swan*, for the defendant.

By Court, Wood, J. The plaintiff in his declaration counts on a sealed note, bearing date July 20, 1827, for the sum of five hundred dollars, payable on or before the fifteenth of November next, after its date. To this declaration the defendant has filed a special plea in bar, that the said note was "obtained from the said Stotts by the said Saunders, and others in collusion with him, by fraud, covin, and misrepresentation." 2. Plea, *non est factum*. To the special plea there is a general demurrer and joinder.

The only inquiry is, can the special plea be sustained? That fraud is a defense at law, is not now to be considered as an open question. It has been settled by numerous adjudications. So far has the principle been carried, that in a court of equity a defendant will not be relieved against a penal bond, obtained from him by fraud, if he has neglected to make his defense at law: *Lacy v. Garard*, 2 Ohio, 7.

But to avoid a deed, it is claimed, the only fraud which can be pleaded at law is fraud in its execution, such as its fraudulent reading; the substitution of one instrument for another; or

the obtaining by some device or fraudulent representation such an instrument as the party did not intend to give. This is doubtless the law on the subject: *Vrooman v. Phelps*, 2 Johns. 177; *Dorr v. Munsell*, 13 Id. 430; *Belden v. Davies*, 2 Hall, 446; *Hazard v. Irwin*, 18 Pick. 95. Let us apply this law to the case before us; the defendant has pleaded, that the note was obtained by "fraud, covin, and misrepresentation."

The counsel for the plaintiff claim that this plea is bad, because it does not set out the facts and circumstances on which the fraud arises; and that it is uncertain from the plea whether the fraud, covin, and misrepresentation it sets up have reference to the inducements to the execution of the note, or the execution itself. This may be answered thus: that fraud is a mixed question of law and fact; that it consists of a multiplicity of circumstances, and therefore might be inconvenient to require them to be set forth: 2 Mau. & Sel. 377; that there are many precedents, directly in point, which are evidence, that the law holds such general allegation of fraud and covin sufficient. In Will. Pr. 93, the pleader is advised to add a plea of fraud and covin generally, omitting a statement of the particular misrepresentations. Several authorities are cited to sustain such position. The case of *Dorr v. Munsell*, 13 Johns. 430, it is true, is said by the author to be against the sufficiency of such plea, but with due respect for his accuracy, I am led to a different conclusion. I find nothing in that case, against the sufficiency of such plea, as he advises the pleader to add. The action was debt on a bond. The defendant cravedoyer, and set out the condition, and filed a special plea, setting forth divers fraudulent statements and misrepresentations, all of which were inducements to the making of the bond, but none of them had any relation to a bearing upon its actual execution. The plaintiff demurred specially, and the court determined the plea was bad; that the fraud alleged was in the representation of the thing for which the bond was taken, and did not, by the plaintiff's own showing, relate to the execution of the bond. In this very case, it is also worthy of remark, that there is a third plea of fraud in obtaining the bond generally, to which there is a replication; and from anything to be gathered from the case, was considered by all concerned as a good plea. I have been more particular in this case, because the plaintiff's counsel say it is the authority on which they mainly rely to support their position, that the plea here filed is bad. I think it is entitled, at least, to some consideration as an authority for the defendants.

It is said that this plea affords no notice to the opposite party, whether it is fraud in the execution of the note, or only misrepresentations which were the inducement to make it; which only amount to a want of consideration, and are no defense to a valid instrument. It would seem to me, this objection, on general demurrer, at least, is not well taken. The very nature of a valid instrument precludes an inquiry into the want of consideration; any representations made, therefore, to induce its execution, as to the nature or quality of property for which it is given, and which do not amount to fraud in the execution itself, are settled by the law not to be the subject of inquiry. The plaintiff could not, therefore, be misled by supposing the inquiry under the plea, would be a species of fraud, which the law would not permit on this trial to be investigated. It is clear, then, that no other construction can be given to this plea, than that the fraud, covin, and collusion it sets up are such as relate to the execution of the note, and in this particular the plea is sufficiently certain. Is this plea bad, because it does not aver the acts which constitute the fraud? The current of authority is certainly the other way. In 2 Hall, 434, there is a replication to a special plea in bar, setting up that a deed of release was obtained by fraud and covin; this replication was treated as sufficient, although so general and broad in its allegation, for the defendant in his rejoinder took issue upon it. There are many precedents of high authority in the books to support this plea, and we think it sufficient to bar the plaintiff's right of recovery.

One point more remains to be disposed of. The plaintiff's counsel claim, that if it is fraud in the execution of the contract on which the defendant's counsel rely, that such fraud may be given in evidence, under the general issue of *non est factum*, and, therefore, the plea amounts only to the general issue, and must be held bad. If the counsel are correct on both points of law, their reasoning has nevertheless more ingenuity than solidity, in its application to this case. In assumpsit, payment, award, and satisfaction, a release, discharge, and until the case of *Inman v. Jenkins*,<sup>1</sup> a former recovery might be given in evidence under the general issue. Either of these grounds of defense might be pleaded, and the plea, I apprehend, would not be rejected as amounting to nothing more than the general issue. Fraud may be pleaded here, but because it may be given in evidence, it by no means converts the plea into the general issue. On all the

points made, the plea is held sufficient, and the demurrer is overruled. There is an issue of fact for the jury.

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PLEADING FRAUD.—See *Huston v. Williams*, 25 Am. Dec. 84, note 95, *Davis v. Hooper*, 24 Id. 751, note 753; *Dean v. Mason*, 10 Id. 162; *Taylor v. King*, 8 Id. 746, note 748.

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## SPURGEON v. McELWAIN.

[6 OHIO, 442.]

LAW WILL NOT ASSIST PERSON WHO INTENTIONALLY AIDS ANOTHER in an illegal act, and where it is unlawful to keep a nine-pin alley appurtenant to a coffee-house, a carpenter who builds such an alley, knowing the purpose for which it was constructed, can not recover the price of erecting it.

ASSUMPSIT reserved from Franklin county, on a motion for a new trial. The defendant insisted that as the work was done to aid in playing a game at a place forbidden by law, the consideration was illegal. The court so instructed the jury, who rendered a verdict for the defendant. The plaintiff moves for a new trial on the ground of misdirection. The other facts are stated in the opinion.

*Swan*, for the plaintiff.

*Wilcox*, for the defendant.

By Court, LANE, J. The statute, vol. 29, p. 162, forbids, under a penalty, any tavern-keeper or retailer from keeping, or permitting to be kept, a nine-pin alley in the building occupied for that purpose. Can a carpenter, knowing the object, recover the price of erecting it?

The principle is of general application, that contracts contrary to sound morals, public policy, or forbidden by law, will not be executed by courts of justice. Although the rule is plain and definite, difficulties sometimes arise in its practical application. If an improper use be made of goods innocently sold, or if the results of honest labor be devoted to improper purposes, the agent or the vendee ought not to be visited with the penalty; yet if they intend to assist it in the illegal act, they are parties to its unlawfulness, and deserve no aid from the law: Chit. on Con. 692 b; *Cundell v. Dawson*, 4 Man. G. & S. 376.

For the purpose of drawing the line between fraud and innocence, the plaintiff proposes as a test, to inquire if the plaintiff derives any benefit from the unlawful use of the goods, or appropriation of the fruits of labor. In our opinion, a better rule

may be found, more conformable to sound morality, and sufficiently accurate for practical application. If one intend to aid another in an illegal object, he shall not be assisted by the law. As, if he sells goods packed in a particular form for the purpose of being smuggled: 1 Bos. & Pul. 551. Nor the price of drugs for the purpose of being illegally used in beer: 1 Mau. & Sel. 593. And if, knowing the purpose and having the ability, he do not prevent it, he is deemed to intend it, as in the late case of lodgings let. Abbott held, a weekly rent was not recoverable after the landlord knew they were used for prostitution: 21 Comb. 430 (21 Eng. Com. L. 430); *Jennings v. Throgmorton*, Ry. & M. 251. And the man is deemed to intend the thing he sells or makes shall be appropriated to its ordinary use. If that ordinary use be innocent, he is not chargeable with a subsequent misapplication. If a carpenter build a house, he is not to be presumed to do it for bad purposes; or if a blacksmith sell an ax, he is not to be held privy to a blow which may be struck without proof of design. Yet even here, if he intend to build a brothel or to assist in a burglary, he ought not to have the fruits of his labor. And if the ordinary use of the thing produced be illegal, he must be taken as intending the use and as privy to the illegality, and therefore entitled to no benefit for his labor.

Such is the condition of this plaintiff. He assisted in constructing a nine-pin alley appurtenant to a coffee house. It is an erection *sui generis*, whose ordinary use in such a place is unlawful. It was right for the court to charge the jury he could not recover for this work.

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ILLEGAL CONTRACT, ACTION ON.—See *Plumer v. Smith*, 22 Am. Dec. 478; *Roll v. Raguet*, Id. 759, note 761; *Best v. Strong*, 20 Id. 607, note 611; *Gulich v. Ward*, 18 Id. 389, note 403; *Roby v. West*, 17 Id. 423; *Swayze v. Hull*, 14 Id. 399, note; *Gray v. Roberts*, 12 Id. 383, note 385; *Morton v. Fletcher*, Id. 366; *Hibernia T. Corp. v. Henderson*, 11 Id. 593; *Wilson v. Spencer*, 10 Id. 491; *Seidenbender v. Charles*, 8 Id. 682.

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## THE UNIVERSALIST CHURCH v. TRUSTEES, ETC.

[6 OHIO, 445.]

PRACTICE ON MANDAMUS is, in this state, according to the usages and principles of the common law, and no pleadings are allowed to contradict collaterally the return to the writ.

RETURN, WHAT SUFFICIENT.—A return to a writ of mandamus, issued to trustees of ministerial lands to compel them to distribute to the relators

their proportion of the funds accruing from such lands, which states that all of such funds were previously distributed by them to the parties who applied therefor, is sufficient.

**MANDAMUS**, adjourned from Hamilton county. An alternative mandamus was issued upon the relation of the plaintiffs against the trustees of the ministerial section, number twenty-nine, in Columbia township, granted by congress for religious purposes, commanding them to pay to the relators their proportion of the rents and profits of said section for the years 1833-34, or show cause why they refuse. The trustees made return that they were required by law to distribute the rents and profits, on the first Monday of January of each year, to such religious societies as might apply; that they had distributed all the funds in their hands for the years named, and that the relators had not applied to them prior to such distribution. To this return the relators pleaded that they had, in each of said years, regularly applied for their proportion of the rents and profits. To this plea, the defendants demurred generally.

*Storer & Spencer*, for the trustees.

*Fox*, contra.

By Court, **WRIGHT, J.** The first inquiry claiming our attention is, whether by the common law, it is competent for the relator to traverse and falsify the return made to an alternative mandamus?

The object of the remedy by mandamus is to compel public officers and private individuals in matters relating to the public, to perform their public duties: 3 Bl. Com. 110; Bac. Abr., Mandamus; *Jillson v. Putnam County*, 19 Ohio, 415. It is a writ to compel action by, not to give remedy against, the individual officer, for injury resulting from an imperfect or improper action: 3 Burr. 126, 167; 5 Binn. 103.

At the common law no pleadings are allowed beyond the return collaterally to contradict it. Taking the return as true, judgment is pronounced, awarding a peremptory mandamus or refusing it. This is given upon the legal sufficiency of the return. If false, the relator was driven to his action to falsify the return, and to obtain redress. The statute of 9 Anne, c. 20, changed the common law practice in England, and made provision for a course of pleading and regular trial: 4 Bac. Abr. 520; 3 Holt, 266, 267.

In New York the legislature has made provision by statute to regulate the practice in cases upon mandamus: 1 N. R. L. 107;

*People v. Champion*, 16 Johns. 62. In Virginia, Pennsylvania, New Jersey, and Massachusetts, the common law prevails as to such proceeding: *Howard v. Gage*, 6 Mass. 464, 466; 6 Dennis (Dane) Abr. 323, 335; 6 Binn. 9. We have no statute in this state on the subject of the practice on this writ. The statute authorizes the courts to proceed according to the usages and principles of law: 29 Ohio Laws, 56. The rules and principles of the common law have been uniformly held to govern our practice, so far as they are applicable to our condition and circumstances: *Lindsley v. Coats*, 1 Ohio, 245. In *Turner's case*, 5 Id. 542, this court determined that recurrence should be had to the common law, to learn the cases proper for the application of this writ. The counsel for the relators urge that the court is in duty bound to fix some rules to govern the practice on this writ, consonant with the practice in those countries where the common law rule has been found inconvenient and remedied. The court doubtless has the power to regulate its practice, but it is a power to be exercised cautiously. The expediency of exercising the power in this class of cases is questioned. In other states, as well as in England, the practice has been changed by the legislature, not the courts. In this state, this very practice was before the legislature several years ago, and no change was thought necessary. We think the practice might be simplified, and justice more speedily administered than by pursuing the course of the common law; but until the general assembly shall interfere, unless the evils of the present system shall become more apparent to us, we must decline interference. The pleas, therefore, which question the truth of the return to the mandamus can not be received.

The remaining question is upon the sufficiency of the return. It is in substance, that at the annual meeting of the trustees they distributed according to law all the funds in hand to those applying; and the relators did not apply. The trustees have no fund now to distribute. It has all been distributed out. If it has been so distributed in wrong, the individual agents are not to be punished, nor redress secured to the injured in this form of action. The precise question here arising was before the court in Ohio, *ex rel. Hodge v. Newton (Ohio v. Trustees of Township Four)*, 2 Ohio, 109, in which the court held that inasmuch as the command of the mandamus could not act on the specific fund, no order could be awarded to act on any general fund within the control of the trustees. The court say: "The proceeds of each year are specifically appropriated to each society, accord-

ing to the number of its members for that year. There are different owners of the rents for each separate year; and if injustice be done in making a dividend, it can not be corrected in a subsequent one without injustice."

The return is sufficient; a peremptory mandamus is refused, at the cost of the relators.

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RETURN TO WRIT OF MANDAMUS, FACTS STATED IN, NOT TRAVERSABLE.—  
See *Brosius v. Reuter*, 2 Am. Dec. 534.

The principal case is cited in *People v. Lieb*, 85 Ill. 490, to the point that mandamus is not awarded, unless the right of the relator is clear, and the party to be coerced bound to act.

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## DOWS v. HARPER.

[6 OHIO, 518.]

WRIT OF ERROR CORAM NOBIS lies to examine into an error in fact *dehors* the record in a judgment of the supreme court.

APPLICATION for a writ of error. The applicants exhibited to the court the record of a judgment of the supreme court in Ashtabula county, in favor of Harper and Paine, against Dows and Carey, and assigned for error the death of Paine before the judgment, and prayed for a writ of error *coram nobis resident*.

*Griswold and Sawtell*, for the applicants.

By Court, WRIGHT, J. The single question raised upon the application before us is, whether a writ of error will lie to examine into an error in fact, *dehors* the record in a judgment of the supreme court? No practice on the question is known to us, this being the first application within our knowledge, though tradition advises us that the writ has, in times past, been both allowed and refused.

In England, errors in fact are corrected in the common pleas during the judgment term without writ. After the close of the term such errors are examined into upon writ of error in the king's bench: *Sheepshanks v. Lucas*, 1 Burr. 410; 2 Saund. 101, a. n. 1, 308. The writ of error *coram nobis* is not within the statute of 27 Eliz. allowing writs of error from the exchequer to the king's bench; and such writ is held not to lie to the house of lords, because it is inconsistent with the dignity of that court to take cognizance of facts. It has, after great argument, been decided that the king's bench could reverse its own judgment on a writ of error: 3 Salk. 145; 2 Leon. 74; Cro. Eliz. 106; Yelv.



157. It is now held that for errors in fact in the king's bench, its judgments may be reversed in the same court by writ of error *coram nobis resident*: F. N. B. 21, 49; 1 Str. 127; as otherwise the erroneous proceeding could not be reached.

If the necessity for a writ of error to the king's bench in the state of things in England, was a good reason for the use of the writ there, the same reason exists in this state. The supreme court being our highest judicial tribunal, no other court can examine its proceedings, and if the writ of error *coram nobis resident* is refused in our practice, wrongs resulting from the errors in fact of this court, would remain without redress.

The supreme court of New York has adopted the like practice: *Dewitt v. Post*, 11 Johns. 460.

The writ is allowed, returnable to the next term.

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WRIT OF ERROR CORAM NOBIS.—See *Wynne v. The Governor*, 24 Am. Dec. 448, note 449.

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## WATSON v. TRASK.

[6 OHIO, 531.]

**LIBEL, WHAT WORDS CONSTITUTE.**—To print and publish of one that he has infringed another's patent for bark mills, is a libel; for such publication tends to injure his business and reputation, and to expose him to hatred and contempt.

**LIBEL**, adjourned from Geauga county. The plaintiff alleged that he was the original inventor and owner of a valuable bark mill, and that he had been for ten years engaged in the business of manufacturing and selling said mills for profit; and that the defendant published the following libel:

"Caution.—The public are cautioned against purchasing, making, or vending the pretended patent-right of one Watson to the patent bark mill, he having no right whatever to the same. The original patentees to said bark mill are Edward and John Trask, who have deeded their right to this state to the subscriber, who alone can and will dispose of the right to said mill in Ohio. Israel Trask."

"E. and J. Trask invented and put in operation, in the year 1819 or 1820, a bark mill, and in the year 1821 obtained letters patent for the same. In the year 1822, Clinton Watson, by his own confession, saw and examined one of said mills, and it is believed called on the patentees for the purpose of procuring the right of vending the same, which was not granted.

Soon after, he commenced selling mills made after this pattern, and still perseveres in his infringement of the right of said Trask, shielded from prosecution by his want of responsibility. I. Trask."

Plea, not guilty, with notice in justification that the publication is true. Verdict for the plaintiff.

*Mathews and Hitchcock*, for the defendant, now moved in arrest of judgment.

*Perkins*, for the plaintiff.

By Court, WRIGHT, J. Where one falsely and maliciously orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment, or that tends to exclude him from society, or to prejudice him in his office, profession, trade, or business, the parties accused may seek redress by a suit in slander, and recover without proof of actual damage. Where the words are false, the law infers malice, and where their natural tendency is to injure, the law presumes damages: 6 Bac. Abr. 205; Stark. on Sland. 11, 12, 100, 8, 9, 10; *Brooker v. Coffin*, 5 Johns. 188 [4 Am. Dec. 337]; *Backus v. Richardson*, Id. 476; *Burtch v. Nickerson*, 17 Id. 217 [8 Am. Dec. 390]. Where the slander is written and published, it is denominated libel. A libel, in reference to individual injury, may be defined to be a false and malicious publication against an individual, either in print or writing, or by pictures, with intent to injure his reputation and expose him to public hatred, contempt, or ridicule: *Commonwealth v. Clap*, 4 Mass. 163 [3 Am. Dec. 212;] *People v. Crosswell*, 3 Johns. Cas. 354; *Steele v. Southwick*, 9 Johns. 214.

Whatever charge will sustain a suit for slander where the words are merely spoken, will sustain a suit for a libel, if they are written or printed and published; and it will be seen at one glance that many charges, which if merely spoken of another would not sustain a suit for slander, will, if written, or printed and published, sustain a suit for libel. Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace. This we understand to be the settled law of libel in this state, sustained by the uniform decisions of our courts, without a single exception within our knowledge.

Subject the publication in question to the test of the definitions given. The publication is declared to be of the plaintiff in his business of maker and vendor of bark mills. It imputes to him the infraction of another's patent. This, if true, would subject him and those purchasing and using his mills to prosecution. Nothing could have a more direct tendency to the entire destruction of his business. It denies the plaintiff's right to deal in the subject of his occupation, and asserts an adverse, inconsistent right, which he knew and acknowledged. It thus imputes to him falsehood, fraud, the want of capacity to confer a legal right by the sale of his manufactures. It does not stop here. It asserts, moreover, in direct terms, that he perseveres in this fraudulent and pirating trade upon the rights of the Trasks, because he is "shielded from prosecution by his want of responsibility. If irresponsible to the inventor, whose right he was charged with infringing, he was equally so to those who should purchase of him." The charge is, if you deal with this man you incur the risk of lawsuits for violating the rights of others, and he is insolvent, irresponsible to indemnify. Would not such a charge, if true, blacken a man's reputation, injure his business, expose him to hatred and contempt? In our understanding, the publication is unequivocally libelous.

The declaration appears to us sufficient to entitle the plaintiff to judgment.

The point argued for the defendant, that the libel was in separate publications, is not supported by the record; it is alleged to be for publishing a certain libel. The second with the ~~sc~~ appears but as a postscript to the first.

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**LIBELOUS PUBLICATION, WHAT IS.**—See *King v. Root*, 21 Am. Dec. 102, note 114, where the other cases on this subject contained in these reports are collected.

AM. DEC. VOL. XXVII—18

CASES  
IN THE  
SUPREME COURT  
OF  
PENNSYLVANIA.

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HICKMAN v. CALDWELL.    BLACK v. SAME.

[4 RAWLE, 376.]

A *FIERI FACIAS* ISSUED AND LEVIED UPON THE DEBTOR'S PROPERTY, with instructions to stay further proceedings for the present, the object being merely to secure the payment of the judgment, will be postponed to a *fi. fa.* subsequently issued on another judgment against the same debtor, which has been regularly acted upon.

APPEAL from a decision of the court of common pleas of Delaware county, distributing the proceeds of certain real estate sold by the sheriff under execution. On December 30, 1830, John Caldwell confessed a judgment in said court in favor of Ann Black, on a bond of six hundred dollars. On the following day a *fi. fa.* was issued on such judgment, and placed in the hands of the sheriff with instructions as to the levying of it. This *fi. fa.* was returned January 17, 1831, "levied as per inventory," etc., with an inventory attached thereto. On January 21, 1831, an *alias fi. fa.* was issued on the same judgment, and placed in the sheriff's hands with instructions. On February 5, 1831, Hickman obtained judgment against Caldwell, issued a *fi. fa.* thereon, and directed a close levy to be made and the property sold, which was done, and the money paid into court for distribution. On February 29, 1832, a rule was issued on behalf of Hickman to show cause why he should not be allowed to take the amount of his judgment from the money paid into court, and on May 28, 1832, a similar rule was issued in favor of Mrs. Black. The court decided that the latter was entitled to all the money in court. The instructions given to the

sheriff as to the levying of said writs, as well as the evidence in the case, are stated in the opinion of the court.

*Dick and Dillingham*, for the appellant.

*S. Edwards and Tilghman*, contra.

By Court, GIBSON, C. J. This case is said to have been ruled below on the authority of *Howell v. Alkyn*, 2 Rawle, 282, and ruling it by the principles assumed by the judge to whom was assigned, in that case, the duty of pronouncing the judgment of the court, instead of ruling it by the point, directly decided, the conclusion drawn by the president of the common pleas, could not well have been avoided. I feel bound to say, however, that those were not the principles of the cause as settled in consultation, the circumstance intended to have been made the test, being the same that had been applied in *Eberle v. Mayer*, 1 Id. 366, and that has since been applied in the *Commonwealth v. Stremback*, 3 Id. 341 [24 Am. Dec. 351], to wit, the presence or the absence of a direction to stay proceedings on the levy. There was no such direction in *Howell v. Alkyn*, and the mere sufferance of procrastination by the officer was held not to be fraudulent *per se*. Had the exact bearing and extent of the principles laid down in the opinion delivered, been perceived at the time, the disclaimer would have been made then, which I feel it a duty to the profession and the court to make now. I am happy to have the authority of my brother Rogers, the other survivor of the judges who then composed the court, for the entire accuracy of this statement, and for saying that the principles laid down by my brother Huston were peculiar to him. Then, without intimating an opinion on the point made here, in relation to the supposed effect of the return on the rights of the parties, we will determine this case, as we have determined all others of a similar nature, by an application of the test just mentioned. The principle of this test is, that to levy with directions to proceed no further, can be referred to no object but the creation of a lien which the law does not tolerate. What was the object here? Ann Black, who claims priority, put her *fieri facias* into the hands of the sheriff, with instructions that will presently be stated, on the thirty-first of December, 1831, which was returned at the January term succeeding, "levied as per inventory." Immediately after this return was made into office, an *alias fieri facias*, which was not the next process in order, and which is therefore a suspicious circumstance, was issued to the succeeding term. Hick-

man put his execution into the sheriff's hands on the fifth of February, with directions to proceed promptly, make a close levy, and sell the property. To this execution the sheriff returned, "Levied the debt and damages within specified, etc., and that he has the money," etc. To Black's *alias* he returned, "Levied the sum of five hundred and fifty-nine dollars twelve cents, part of which is subject to the payment of Hickman's execution, and leaving only two hundred and one dollars thirty-seven cents to be applied to the payment of costs and part of the debt on Mrs. Black's execution."

Thus stands the case on the written evidence of the writs and returns. The parol evidence makes it perfectly clear that there was an actual plan on the part of Mrs. Black, her attorney, and the debtor, who was her brother, to use her execution, not only for purposes of present security, but to cover the property for a time from other creditors. The sheriff testifies, that he received his instructions from the debtor himself and the plaintiff's attorney, and that they furnished him with a list of the property, the debtor saying, it was not worth while to go to the house; that he was insolvent, going to break, and must be sold out; and that he would give the sheriff a correct account of the property. The sheriff further testifies that the attorney made the schedule and delivered it to him, desiring him "to hold on to that writ," and saying it was not his client's disposition to sell Caldwell out; it was only to make her safe. The officer swears he would not have sold on the second execution, if the attorney had not directed him to stay proceedings on the first: That when the *alias* was put into his hands in court, he was requested not to return the preceding execution till the attorney had delivered him that, as his client had no disposition to sell the debtor out, but only to make herself secure: That the debtor said he had made Martin his attorney; and that Martin had ordered the proceedings to be stayed. There was much more to the same effect, the order to stay being further proved by Vernon, a witness present when it was given. Martin corroborates the testimony of the sheriff, and says, he told him, when the latter called for instructions, that it was not the plaintiff's wish to sell the property "at that present time; that it was the dead of winter, and the property would sell better at another time, and he would give him instructions as to the time; and that the plaintiff did not want to press her brother if she were secure of the debt, but wanted the proceedings stayed for the present, so far as regarded advertising and proceeding to sale." He proved,

however, that he ordered the sheriff to proceed promptly as soon as he discovered that there was a conflicting execution in his hands, and that both Mrs. Black and Caldwell applied to him to issue the execution, the latter admitting he owed her six hundred dollars, and the former desiring the attorney to have it secured.

This is the substance of the case, given for the most part in the words of the witnesses; and it shows not only a stay of execution, pursuant to an order of the execution creditor, but a clear preconcerted plan, not only to levy the execution as a security, but to keep the other creditors at bay, so that it is unnecessary to say, that it presents one of the strongest instances of legal fraud that can be imagined. It is ordered, therefore, that the decree of the court below be reversed, and that the money in court be applied in the first place to Hickman's execution, leaving the surplus for that of Mrs. Black.

Decree reversed.

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Cited in *Corlies v. Stanbridge*, 5 Rawle, 290, to the point that a creditor who has an execution levied upon the debtor's property, with instructions to stay further proceedings, the object being merely to secure the payment of his judgment, loses his lien as against an execution subsequently issued and regularly acted upon; and in *McCoy v. Reed*, 5 Watts, 302, to the effect that the mere delay of the sheriff, even by the sufferance of the execution creditor, is not fraudulent *per se*, so as to postpone one execution to another, unless the creditor has directed the sheriff not to proceed.

EXECUTION BINDS PROPERTY FROM WHAT TIME.—At the common law, an execution bound the defendant's property from its teste: *Green v. Johnson*, 11 Am. Dec. 763, note 772; *Jones v. Jones*, 18 Id. 327; *Hanson v. Barnes' Lessees*, 22 Id. 322; and if the conduct of the plaintiff was *bona fide*, his execution, if first tested, was entitled to priority over one of junior teste but first levied: *Green v. Johnson*, 11 Id. 772. The lien of a writ of execution attaches immediately upon its coming into the hands of the sheriff, and takes precedence over subsequent transfers: *Beals v. Guernsey*, 5 Id. 348; *Haggerty v. Wilber*, 8 Id. 321; *Cresson v. Stout*, Id. 373; *Beals v. Allen*, 9 Id. 221; *Jones v. Jones*, 18 Id. 327; *Million v. Riley*, 25 Id. 149, note 154; and *Butler v. Maynard*, ante, 100.

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## RHOADS v. GAUL ET AL.

[4 RAWLE, 404.]

ENTRIES OF THE SALE OF GOODS in a book of original entry made at the time of sale, but before delivery, are not competent evidence to prove a delivery of such goods.

SUCH ENTRIES, TO BE EVIDENCE OF DELIVERY, should be made at the time the goods are delivered or immediately afterwards.

ARBITRARY SIGNS OR MARKS AFFIXED TO THE ENTRY OF EACH ARTICLE in a

book of original entry, for the purpose of indicating that it has been delivered, and to prevent a second delivery of similar articles, are not evidence of a delivery, it not appearing by whom they were affixed.

**ASSUMPSIT** brought by Martin and William Gaul, surviving partners of the firm of Gaul & Sons, against the plaintiff in error, Daniel J. Rhoads, for goods sold and delivered. Pleas, non-assumpsit and payment. It appeared from the bill of exceptions returned with the record, that preparatory to offering in evidence their book of original entry, the plaintiffs called a witness who testified that the book produced was plaintiffs' book of original entry, and that certain charges in it against the defendant were in the handwriting of a person who was formerly plaintiffs' clerk, but who was then out of the jurisdiction of the court, and that such charges were made when the goods were ordered. One of the plaintiffs testified, that such charges against the defendant were made before the goods were delivered. That plaintiffs had a sign by which the delivery of goods was indicated, and that such sign was generally made, although not always, by the person making the entries in the book. That the entries were made at the time of the sale, and if the goods had not been delivered, the entries would have been erased. That the sign used was a tick made thus ✓, and it was to show that goods had been delivered. That it was generally made by the person who saw the porter take the goods to deliver them, but that he could not say from the ticks after defendant's name who made them. The entries against the defendant in such book were offered in evidence, from which it appeared that defendant was charged with certain articles, and after each entry appeared the mark referred to. Verdict for plaintiffs.

*Bouvier*, for the plaintiff in error.

*Grimshaw*, for the defendants in error.

By Court, GIBSON, C. J. A shop book is competent as a registry of the sales made in the course of the business; and, in the nature of things, no true registry can be made of a fact that has not happened. If it were registered as having already happened, under a confident expectation that it would happen, the registry was false when it was made, and being false then, it is false still. The entries, therefore, ought to be made at the delivery of the goods, or immediately afterwards; and this is what is meant in *Curren v. Crawford*, 4 Serg. & R. 3, by saying they ought to be made at or near the time. It is an undisputed part



of the present case, that the charges were made when the goods were ordered and before they were sent, so that the entries are clearly incompetent standing by themselves; and what supplemental or independent fact is there to prove the delivery, which is as indispensable to charge the customer as the sale itself? It is that an arbitrary mark or sign was separately affixed to the entry of each article; not, however, to charge the defendant, but to inform the porter, so as to prevent a second delivery. According to *Rogers v. Old*, 5 Serg. & R. 404, in which an entry, not purporting on its face to charge the party was held to be inadmissible, the purpose of the marks is conclusive of their incompetency; for it must be indifferent whether there be no apparent intent to charge at all, or an apparent intent rebutted by the evidence adduced to explain and support it. Independent of this, it is decisive that the marks were not always made by the hand that made the charge: and that no witness proves them to have been made in this instance, by the plaintiff or a clerk in his employment. If, then, we treat the marks as the substantive evidence of delivery, dismissing all beside, except so far as it serves to explain the meaning of the marks, we look in vain for proof of their authenticity. In questions of this sort it is necessary to show, not only the originality of the book, but the genuineness of the writing, in order to raise a presumption that the transaction was in the usual course of the business. Such is the principle of *Sterrett v. Bull*, 1 Binn. 234, by which it was determined that entries in the handwriting of a clerk must be verified by his oath, or proof be made that he is dead or out of the jurisdiction. What we have here as evidence of delivery is a set of arbitrary signs, intelligible but to those who are in the service of the plaintiff, and unsupported by the oath of him who made them, consequently they ought not to have gone to the jury.

Judgment reversed, and a *venire de novo* awarded.

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Cited in *Parker v. Donaldson*, 2 W. & S. 19, and *Keim v. Rush*, 5 Id. 379, to the effect that entries of the sale of goods, made in a book of original entries, to be evidence, must be made at the time the goods are delivered, or immediately afterwards.

BOOKS OF ACCOUNT AS EVIDENCE.—This subject is considered in its various aspects in the note to *Union Bank v. Knapp*, 15 Am. Dec. 191; see also *Boyd v. Ladson*, 17 Id. 707; *Drummond v. Hyams*, 18 Id. 649, and *Smith v. San-  
f. l*, 22 Id. 415.

## EARNEST v. PARKE.

[4 RAWLE, 452.]

**AN ABSOLUTE UNCONDITIONAL PROMISE** by a person to pay a debt from which he has been discharged by proceedings in insolvency, creates a binding contract upon which an action may be maintained against him.

PARKE, the defendant in error, and also the defendant below, was indebted to Earnest in the sum of forty-nine dollars and seven cents, for goods sold and delivered. He took the benefit of the insolvent law, and subsequent to his discharge made an absolute and unconditional promise to pay the debt. The court being of opinion that the promise was without consideration and void, entered judgment in favor of defendant.

*J. Randall*, for the plaintiff in error.

*E. Hurst*, for the defendant in error.

By Court, ROGERS, J. The defendant, Parke, was indebted to the plaintiff, Earnest, for goods sold and delivered. After the debt was contracted, Parke took the benefit of the law for the relief of insolvent debtors, but subsequent to his discharge he made an absolute and unconditional promise to pay the debt. The plaintiff sued the defendant, and on the trial proved the promise, and the point is, whether the court of common pleas were correct in ruling that the promise to pay was without consideration and void, and for this reason entering a judgment for the defendant.

This is the first time the question has risen in this shape. It has been presented heretofore on applications to discharge debtors from arrest, on common bail on mesne process; sometimes, though rarely, on final process, or in cases where suit had been brought on the old debt, and not on the new promise. All of these may be distinguishable from the present. The court has decided the broad principle, that the promise is without consideration, which may be a distinct question from the legal effect which may result from a new promise or contract as regards the right of arrest, either on mesne or final process. We must, in the first instance, discard all considerations arising from the fact, that this is a parol promise; for the law of this state unquestionably is, that the promise being admitted or proved, it has the same legal effect as if made in writing in the most solemn form. That the defendant made a promise to pay the debt, without qualification, is part of the case. No fraud or surprise is alleged; we therefore labor under no embarrass-

ment in our inquiries on that account. I must also further remark, that if parties are liable to be entrapped by slight or hasty acknowledgments, it may be a reason for a legislative remedy to meet the case, but can not be an argument entitled to much favor in a court of justice. In point of fact this was neither a slight nor hasty acknowledgment of indebtedness, but a promise deliberately made, with no greater or less legal effect than would have resulted from a note of hand, or a bond with a warrant of attorney to confess a judgment. If this promise is void, for the same reason a note or bond, given by a discharged insolvent debtor to his creditor, would be void also.

On principle, we are unanimously of the opinion, this judgment can not be supported; and for the following reasons: It has been repeatedly held that a debt due in honor and conscience, is a good consideration for a promise to pay, and for this principle, which has a direct bearing on the case, I refer generally to the authorities cited at the bar. Indeed this is not denied in bankruptcy, infancy, or in cases where debts are barred by the act of limitations; but a distinction is attempted in favor of an insolvent debtor, the reasons of which I shall examine hereafter. In *Willing v. Peters*, 12 Serg. & R. 177, it is decided that a promise by a debtor, after the execution of a voluntary release under seal by the creditor, at the debtor's request, to pay the balance of the debt, is founded on a sufficient consideration. The principle is fully recognized, that even where a debt is so far extinguished as not to be recoverable either in law or equity, but yet exists in morality and good conscience, it affords a sufficient consideration for an assumption. This is exemplified in the case of a bankrupt, for although the debt is discharged in law, yet, by the common sense and feeling of mankind, it exists, until it is actually paid. It is difficult to imagine a case stronger, in illustration of the general principle which has been assumed, than the case just cited. There, Mr. Peters gave a voluntary release of the debt, but notwithstanding the debt was extinguished by his own act, yet the previous indebtedness was held to be a valid consideration for the promise by Willing to pay. In the case at bar, Parke not only owes the money in honesty and good conscience, but in law also. The debt still remains, although his person by the discharge is exempted from arrest; and in this respect, the discharge of an insolvent differs from a certificate in bankruptcy; and this gives rise to one of the arguments on which the defendant in error mainly relies.

It is contended, that as the debt of an insolvent debtor remains in full force, a mere naked promise to pay it, not founded on a new consideration, such as forbearance, can not alter the situation of the parties as between themselves, so as to give the creditor a new remedy, when no new responsibility is created. I must say I can not feel the difficulty which seems to have struck the mind of the counsel with so much force. If it alters the situation of the parties in a case of bankruptcy, or where, as in *Willing v. Peters*, the debt is extinguished by a voluntary release, some satisfactory reason should be given why it does not produce the same effect in the case of insolvent debtors, where the debt remains and only one of his remedies is gone. If it has that same effect in the instance stated (and that it has can not be controverted), much more so should it produce this result in the case at bar. The argument *a fortiori* is, in my judgment, exceedingly strong. But the argument is founded in fallacy. It assumes a position which is by no means conceded. Before we yield to its force we must be convinced that no new responsibility is created. And so far from this being the case, I am persuaded, the promise by an insolvent debtor to pay a debt does create a new responsibility. By entering into a new contract, which I shall show the supreme court in *Field's case* [21 Am. Dec. 454], have decided this to be, Parke consents to waive the benefit of the law, and subject his person to arrest. It can not be denied that a party may either expressly; or by implication, waive a provision in law intended for his benefit, as is shown in cases of infancy, or in the common cases arising under the act of limitations, and this is an answer to *Landis v. Urie et al.*, 10 Serg. & R. 323. It is true, as is there decided, "that if a man promise to pay his bond, without any new consideration, assumpsit can not be brought for the money;" and the reason is, because there is neither a new consideration, nor a new responsibility. The promise left the contract just where it found it, and therefore it would be idle to support an action of assumpsit, on a promise to pay; the remedy, and it is an effectual one, is on the bond itself. But when that is not the case, the opinion of Lord Kenyon to the contrary notwithstanding, the law is otherwise. As where, under the act of the twenty-eighth of May, 1715, a bond has been informally assigned, a parol promise to the assignee to pay him the money secured by the bond, would support assumpsit, and the reason is, because the promise effects a change in the situation of the parties, by enabling the

plaintiff to bring a suit in his own name, and alters the liability of the defendant.

The decision of the court in *Field's case*, 2 Rawle, 351 [21 Am. Dec. 454], to which I have before referred, has a direct bearing on this question. It goes far to show, that by a subsequent promise a new contract, and of course a new responsibility, is created. Indeed, all the modern cases on the act of limitations, which bear a strong analogy in this respect to the present, go entirely on the ground of a new contract. The idea that by the promise the old debt is revived, has been exploded, and in effecting this change the courts of this state have taken a distinguished part.

*Field's case* was a case of bankruptcy; but that I have endeavored to show, if it makes any difference in principle, is rather against the argument of the defendant in error. It was there held, that a debt discharged by a certificate of bankruptcy, is an available consideration for a new promise: That a promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt as a debt by specialty, but that the original debt is a consideration, which renders the new promise available. The court were of the opinion that the creditor had a right to come upon the fund on the new contract, as a simple contract creditor, but not on the footing of a debt due by specialty, and that by the promise to pay, a new debt was contracted. Lord Mansfield says, in one of the cases cited, "that where a remedy is taken away, and not the debt, the debt is a debt in conscience, and may be the ground of a future promise or security." The counsel for the defendant in error seem to feel the force of this position, the truth of which they admit in relation to a case in which all remedies are taken away, as in the case of infancy, a debt barred by the act of limitations, or by the bankruptcy and certificate of the defendant, but they deny it as regards a case where only one remedy is gone. No reason has been given for the distinction at the bar, and it is not easy to understand why a promise should revive several remedies, and yet should not have the legal effect of reviving one remedy. I can perceive no good reason for any anxiety to exempt insolvents from liability on account of their contracts. If, as in *Field's case*, it is a new contract, the defendant, by the new engagement into which he has voluntarily entered, has rendered himself liable to suit, and to all the remedies pursued in the collection of debts, among which, in the eye of the law, the right to arrest the person on

final process, and its consequences, are not the least important. This remedy may sometimes enable a creditor, by appealing to the oath of his debtor, to recover a just debt. It gives a right to the legal assignee to collect the assets of the insolvent, whether it be property in possession, or choses in action; and without this remedy, we are well aware an insolvent debtor may put his creditors at defiance, so far as regards property, which can not be seized in execution.

I have remarked, that this question comes before the court in a new shape, for as Mr. Ingraham observes, in his treatise on insolvency, the cases which have occurred in this state have been decisions by single judges, the parties sued upon the new promise being in confinement upon magistrate's executions, and applying by *habeas corpus* to be discharged. In forming our opinion, we have given the decisions cited all the attention which they so justly deserve, without, however, arriving at the same result. The chief justice has no note of *Heppard v. Douglas*, Ingr. on Insol. 208, nor any recollection of the circumstances of the case. We have no certainty that the case has been accurately reported; on inquiry we find it is impossible to ascertain the facts on which it so materially depends. No doubt the case of *Heppard v. Douglas* had great weight with the judges, who are said to have ruled the point in their chambers in the same way.

Several cases have been cited from the New York reports, but in that state the question does not appear to be settled. In *Scouton v. Eislord*, 7 Johns. 36, where it is first noticed, it is decided, that a debt due by an insolvent as well as a bankrupt, is a debt due in conscience, and is a sufficient consideration for a new promise to pay the debt. *Shippey v. Henderson*, 14 Johns. 178 [7 Am. Dec. 458], as was supposed, contained the same principle. But it is said *Couch v. Ash*, 5 Cow. 265, and *Hubert v. Williams*, 5 Cow. 537, establish a contrary doctrine; and there is reason for this assertion, unless the cases can be distinguished on the ground that the action was upon the original debt, and not upon the new promise, thereby indicating an election on the part of the plaintiff to consider the new promise as nothing more than a revival of the old debt, and not a new contract. And this idea would seem to have had some effect on Justice Sutherland, who delivered the opinion of the court. There was no new consideration, he says, for the subsequent acknowledgment, or promise to pay the debt. The action is not upon that, but upon the original promise.

He afterwards says that the defendant was never discharged from the debt. The new promise, therefore, was nothing more than an acknowledgment of his existing liability, and would not be a foundation for a new action. If, however, as is contended, the court intended to say, that no action would lie on a new contract entered into by the insolvent, the consideration of which was the previous indebtedness, I must dissent from the principle, and must further say, that the cases cited, if not at war with *Shippey v. Henderson*, are in opposition to *Scouton v. Eislord*, which were not even cited by court or counsel.

The authorities cited at the bar, are for the most part cases which have arisen on applications to discharge the debtor from arrest on common bail. They do not, I conceive, affect the general principle: *Bailey v. Dillon*, 2 Burr. 736, shows the reason the courts discharge an insolvent debtor from arrest on common bail. In *Bailey v. Dillon*, the general question was, whether a person indebted to another, and afterwards becoming bankrupt, and being regularly discharged by having conformed himself to the bankrupt acts, and having obtained his certificate, but afterwards making a new acknowledgment of the same debt being due, and also a new promise to pay it, shall, or shall not be liable to payment?

The plaintiff had arrested the defendant, and the application to the court was to discharge him on common bail. And in relation to this point the court say, it is quite unnecessary to enter into the general or principal question, or enter at all into the merits of the case upon the present motion, since it would be very improper to determine such a point, in this method, upon a question about special or common bail. Therefore, they said, they would not meddle with the merits, nor give any opinion at all on the general question. But as to the particular question, which was the subject of the present motion, they were unanimous that he ought to be discharged on common bail.

These questions have generally arisen on a parol promise to pay the debt, and as the fact of the promise may admit of dispute, the court will not, in this stage of the proceeding, inquire whether the parties have entered into a new contract, and particularly when the suit is brought upon the old debt. And although the plaintiff makes a positive affidavit of the debt, yet this being in its nature *ex parte*, has not been considered such evidence of the fact of indebtedness, as to justify holding the defendant to special bail. The courts have felt it their duty to discharge on common bail, and leave the fact of a new promise

to be ascertained by a jury. This is a decision in favor of liberty, and as far as it goes I have nothing to urge against its correctness.

The cases bearing on this question, in England, before and since 1776, have been cited by Mr. Ingraham in his treatise on insolvency, page 202, and are very much at variance with each other; so much so, that it is difficult to know what the law now is in that country. Since 1776, they are not authority in this state, nor have they much to recommend them from the intrinsic merits of the decisions themselves.

An argument has been drawn from the words of the act Stress has been laid on the word "occasioned." After an examination of the act, I can not bring myself to believe that the word "occasioned" is of larger import than the words "accrued and due," with which they are associated in the act. If, as in *Field's case*, by the new promise a new debt is created, there is nothing in the act, or in the reason of the thing, which can prevent the creditor from availing himself of it as a new contract, except that he can not, in certain cases, hold him to special bail. And this exception, in my opinion, depends as much upon authority, as any reason that may be offered in support of it.

In *Shippey v. Henderson*, it is said that where a debt has been barred by the defendant's discharge under the insolvent act, it is proper for the plaintiff to declare upon the original cause of action without noticing the subsequent promise. And when this is done, the court will, of course, discharge the defendant from arrest on common bail; and this is perhaps the reason that we have such contrariety of decisions on this point. It has been viewed merely as the revival of the old debt, as in the case of the act of limitations. Had it been considered in the light of a new contract, as it has uniformly been in Pennsylvania, difficulties would have been avoided. The defendant has the same power to make this as any other contract, and the contract being made, it would have created a valid debt, recoverable at law by all the remedies common to other actions. In *Field's case*, it is intimated that suit should be brought on the new promise, as the new promise, and not the old debt, is the meritorious cause of action.

Judgment reversed.

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Cited in *Thomas v. Hodgson*, 4 Whart. 498, and *Reeside v. Hadden*, 12 Pa. St. 245, to the effect that a promise to pay a debt by an insolvent debtor, which existed before his discharge, creates a new contract, upon which a suit may be brought.



**PROMISE TO PAY DEBT DISCHARGED IN BANKRUPTCY.**—At an early date the opinion prevailed that a moral obligation to pay a demand, or perform a duty, was a sufficient consideration for an express promise, although no legal liability existed at the time of making such promise: 1 Chit. on Con. (11 Am. ed.) 52; 2 Bl. Com. 445; *Hawkes v. Saunders*, Cowp. 290, 294; *Atkins v. Banwell*, 2 East, 506; *Lee v. Mugeridge*, 5 Taunt. 37; *Seaman v. Price*, 2 Bing. 437, 439; *Bentley v. Morse*, 14 Johns. 468; *Glass v. Beach*, 5 Vt. 172; *Com. v. Perry*, 5 Ham. 58; *Turner v. Partridge*, 3 P. & W. 172. Thus said Lord Mansfield, in *Hawkes v. Saunders*, *supra*, “where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.” So in *Atkins v. Banwell*, 2 East, 506, Lord Ellenborough said: “A moral obligation is a good consideration for an express promise; but it has never been carried further, so as to raise an implied promise in law.” Notwithstanding the opinion of such eminent judges, the decisions upon this question were by no means uniform, doubt being expressed, from time to time, whether so broad a rule was correct, and if so, whether it should be enforced.

In a note to *Wenmall v. Adney*, 3 Bos. & Pul. 249, the correctness of the rule as above stated was assailed by the reporter, and it was there said that the proposition, that an express promise founded simply on an antecedent moral obligation was sufficient to support assumpsit, was inaccurate. After an extended examination of the various decisions and *dicta* upon the question up to that time, including the two cases from which quotations have just been made, the conclusion there reached was, that “an express promise, therefore, as it should, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.” This conclusion has been frequently recognized as correct by different courts and text-writers, and it is now the settled law both of England and America, that no action can be maintained upon a promise founded solely upon a moral consideration: *Eastwood v. Kenyon*, 11 Ad. & E. 436, 438; S. C., 3 Per. & Dav. 276; *Beaumont v. Reeve*, 8 Q. B. 483; *Mills v. Wyman*, 3 Pick. 207; *Dodge v. Adams*, 19 Id. 429; *Ehle v. Judson*, 24 Wend. 97; *Wiggins v. Keizer*, 6 Ind. 252; *Dearborn v. Bowman*, 3 Metc. 155; *Hendricks v. Robinson*, 56 Miss. 694; *Uphike v. Titus*, 2 Beas. 151; *Shepard v. Rhodes*, 7 R. I. 470; *Cook v. Bradley*, 7 Conn. 57; *Turlington v. Slaughter*, 54 Ala. 195; 1 Chit. on Con. (11 Am. ed.) 53; Smith on Con. 187; Pollock’s Principles of Contracts (1 Am. ed.) 158. In *Bradford v. Rouston*, 8 Ir. L. R., N. S. 468, it was held that a past consideration from which the law will not imply a promise, will support a subsequent express promise, in itself unobjectionable, if such consideration be moved by the previous request of the party promising. In *Cook v. Bradley*, 7 Conn. 63, Daggett, J., thus refers to the binding efficacy in a court of law of a contract founded on a moral consideration:

“It can not be successfully contended, that in every case where a person is under a moral obligation to do an act, as, to relieve one in distress, by personal exertions, or the expenditure of money, a promise to that effect would be binding in a court of law. It is a just rule of morality, that a man should do towards others what he might reasonably expect from others in like circumstances. This rule is sanctioned by the highest authority, and is very

comprehensive. An affectionate father, brother, or sister has taken by the hand the youngest son of the family; given him an education, and placed him in a situation to become, and he has become, affluent. The father, brother, or sister, by the visitation of Providence, has become poor and impotent, and houseless. The son, rolling in riches, in the overflowing of his gratitude for kindness experienced, contracts in writing to discharge some portion of the debt of gratitude by giving to his destitute relative some one of his numerous houses for a shelter, and a thousand of his many dollars for his subsistence; can such a promise be enforced in any judicial tribunal? Municipal law will not decide, what honor or gratitude ought to induce the son to do in such a case, as Dr. Blackstone remarks [2 Bl. Com. 445], but it must be left to the forum of conscience. \* \* \* On the whole, I am not satisfied that a case can be found in the English books, in which it has been held, that a moral consideration is a sufficient consideration for an express promise, though there are many to the contrary." Notwithstanding, the correctness of this rule seems now to be conceded, so also is an exception thereto, that where a legal obligation has once existed to pay money or perform a duty, and which would be enforceable but for the interference of some rule of law, the moral obligation to pay the money or perform the duty has always been held to be a sufficient consideration for a promise so to do. Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations or bankruptcy, is good without other consideration than the previous legal obligation: 1 Pars. on Con. 434.

The authorities hereinafter cited will be confined to those cases in which the question, whether a promise to pay a debt discharged in bankruptcy is binding and enforceable, without other consideration than the previous legal obligation to pay the debt, has been considered and determined. The decisions upon this branch of the question, as far as our examination extends, are uniform, and all to the effect that a contract founded upon such consideration will be enforced: *Trueman v. Fenton*, 2 Cowp. 544; *Twiss v. Mossey*, 1 Atk. 67; *Ex parte Burton*, Id. 255; *Benford v. Saunders*, 2 H. Bl. 116; *Brix v. Braham*, 1 Bing. 281; *Best v. Barber*, 3 Doug. 188; *Birch v. Sharland*, 1 T. R. 715; *Corliss v. Shepherd*, 28 Me. 550; *Otis v. Gazlin*, 31 Id. 567; *Patten v. Ellingwood*, 32 Id. 163; *Russ v. Butterfield*, 6 Cush. 242; *Farmers v. Flint*, 17 Vt. 508; *Walbridge v. Harroon*, 18 Id. 448; *Scouton v. Eislord*, 7 Johns. 36; *Shippey v. Henderson*, 14 Id. 178; *Erwin v. Saunders*, 1 Cow. 249. In *Way v. Sperry*, 6 Cush. 242, which was an action brought to recover the amount of three promissory notes from which the defendant had been discharged in bankruptcy, and which he had, subsequent to such discharge, verbally promised to pay, Metcalf, J., speaking for the court, said: "We can not perceive any legal difference, as to the point now in question, between the case of a debt that has been discharged by a process in bankruptcy, and a claim voidable on the ground of infancy, or barred by the statute of limitations. In the latter case, it has been decided that a new promise removes the statute bar, but does not create a new and substantive cause of action which is the basis of a judgment, and that the judgment must be considered as rendered on the old contract: *Isley v. Jewett*, 3 Metc. 439. And where an infant gave a negotiable note, which he ratified by a new promise after he was of age, it was decided that he was liable on it to an indorsee, to whom the payee negotiated it after the ratification. The court said the ratification gave the contract 'the same effect as if the promisor had been of legal capacity to make the note when he made it. This made it a good negotiable note from that time, according to its tenor; of course when transferred to the plaintiff, he took it as a negotiable note, and may maintain an action on

it: *Reed v. Bacheider*, 1 Metc. 559. And the indorsement of a note, after a new promise to the payee has taken it out of the statute of limitations, enables the indorsee to sue the maker: *Little v. Blount*, 9 Pick. 488, and 16 Pick. 359. The same rule is applicable to the case at bar."

The new promise to be binding, however, must be an absolute and distinct promise to pay the debt, from which the party promising has been discharged: *Prewett v. Caruthers*, 12 S. & M. 491; *Brown v. Collier*, 8 Humph. 510; *Yortheimer v. Keyser*, 11 Pa. St. 364. Payment of the interest, or even payment of part of the principal, is not sufficient to justify a jury in finding that there has been a new promise to pay the whole debt: *Merriam v. Bayley*, 1 Cush. 77; *Cambridge Institution v. Littlefield*, 6 Id. 210. So, if the promise to pay is conditional, the party seeking to enforce it must show that the condition has been performed: *Branch Bank v. Boykin*, 9 Ala. 320; *Patten v. Ellingwood*, 32 Me. 163; *Scouton v. Eislord*, 7 Johns. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Fleming v. Hayne*, 1 Stark. 370. Some difference of opinion exists whether, where a new promise has been made, it is necessary to declare upon it as the foundation of the suit, or whether the action may be brought upon the old promise, and then the new promise used for the purpose of doing away with the bar interposed by the discharge in bankruptcy. In a number of cases it has been held sufficient to declare upon the old promise: *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 Johns. 178; *Way v. Sperry*, 6 Cush. 238; *Foster v. Shaw*, 2 Gray, 153; *Cook v. Shearman*, 103 Mass. 23. But where the new promise is conditional, it is safer to rely upon it as the ground of action, and upon the old one as the consideration for the new one: 1 Pars. on Con. 434; *Wait v. Morris*, 6 Wend. 394; *Fenn v. Bennett*, 4 Camp. 205. So, where the debt from which the party has been discharged was evidenced by a promissory note or bill of exchange, the new promise is held not to revive the negotiability of the bill or note, but simply to bind the insolvent personally, and no action can be maintained upon the note or bill, but must be upon the new promise: *Depuy v. Swart*, 3 Wend. 135 [20 Am. Dec. 673]; *Moore v. Viele*, 4 Id. 420; *White v. Cushing*, 30 Me. 267; *Graham v. Hunt*, 8 B. Mon. 7; *Walbridge v. Harroon*, 18 Vt. 448. See *contra*, *Way v. Sperry*, 6 Cush. 238, 241.

## HALE v. HENRIE.

[2 WATTS, 143.]

**PAROL EVIDENCE IS INADMISSIBLE** to show that a deed, which by its terms conveys certain real estate to two persons as tenants in common, was intended to convey it to them as partners, and that it is partnership property.

**REAL ESTATE CAN ONLY BECOME PARTNERSHIP PROPERTY BY DEED**, or other writing properly recorded, indicating an intention to make it such.

**SHERIFF'S DEED IS CONCLUSIVE EVIDENCE** of the right of possession in the purchaser against the defendant in execution and all claiming under him after the judgment.

**MATTERS OF DEFENSE** accruing subsequent to a judgment, and prior to a sale thereunder, such as payment, satisfaction, and the like, should be taken advantage of by motion to stay proceedings or to set aside the process. They can not be set up to defeat a purchaser's right of possession. AM. DEC. VOL. XXVII—19

sion, acquired by virtue of a sheriff's deed, made in pursuance of a sale under such judgment.

**WHEN THE SUMMARY PROCEEDING** given by the act of April 6, 1802, is resorted to for the purpose of obtaining possession of land sold at sheriff's sale, a person who claims the land by title paramount to the judgment under which the sale has been had may, on making the affidavit and entering into the recognizance required, stay such proceedings, and have his title tried in the court of common pleas.

**UPON SUCH TRIAL THE ONLY MATTER IN ISSUE** is the title averred by the defendant in his affidavit, and he will not be permitted to show that the judgment on which the land was sold had been paid prior to the sale, although the purchaser who seeks to recover possession of the land was the plaintiff in that judgment.

**OMISSION OF ANY MATERIAL PART** of an inquisition may be corrected by parol.

**APPEAL** by defendant from the circuit court of Dauphin county. Hale recovered judgment against George Capp and another, in the court of common pleas of said county, on November 29, 1830, for two thousand five hundred dollars. A *fi. fa.* was issued on this judgment, and levied on the undivided half of a lot of land, and a stable situate thereon, in Harrisburg. An inquisition was held, and it was determined "that the rents, issues, and profits are of a clear yearly value, beyond all reprises, sufficient, within the space of seven years, to satisfy the debt and damages." Plaintiff claimed that a mistake was made in drawing up the inquisition; that it was intended to say that the rents, etc., were not sufficient. A *vend. ex.* was issued in January, 1833, and the property levied on and sold to Hale, who received a sheriff's deed therefor, and in November following commenced proceedings under the act of April 6, 1802, to obtain possession. Henrie, claiming title in himself, different from Capp's, and as not holding under him, entered into the bond required to appear at the next term of the court of common pleas to prosecute his claim with effect. The proceedings being filed in such court, were removed to the circuit court for trial. It appeared that the lot and stable purchased by plaintiff under his judgment, were purchased by George Capp and Nathaniel Henrie, on June 10, 1829, and a deed made to them therefor as tenants in common. Defendant offered to prove by parol that he and Capp were partners on said last mentioned date, and that they purchased said property with partnership funds, and for partnership purposes. That it was used by them in their partnership business until their dissolution, when it was left with Henrie, the defendant, to pay the partnership debts, and that such debts exceeded the debts due the firm, and the value of such property.

This testimony was objected to by plaintiff, and rejected by the court. Verdict for plaintiff.

*Krause and Foster*, for the appellant.

*McCormick*, *contra*.

By Court, SERGEANT, J. The title set up by the defendant professes to be paramount to that of Henrie in his separate capacity, and to defeat the plaintiff's execution, by showing that, although the deed to Capp and Henrie was to them as tenants in common, and therefore, on its face, each held an undivided moiety; yet, in fact, they held the property as partners, pledged to partnership creditors, in exclusion of the plaintiff, who was a separate creditor of one partner. Such a trust or ownership of the property is inconsistent with the title on record, which is vested in them as tenants in common. To permit a person, apparently owning property as an individual, to aver a different right in himself as partner, by which his relations to creditors and others are to be affected, would defeat the statute of frauds and perjuries, by which no interest in real estates (except a lease for a short period) can vest or be transferred without deed or writing. It would even be worse than to pass real estate without writing: since a deed would thus express one thing and mean another; and our recording acts, instead of being guides to truth, would be no better than snares.

The policy of the recording acts, which began with the settlement of the state, and which long experience has proved to be beneficial, is to render the manner in which an interest or right in real estate is held, in every respect, open and notorious. They require all deeds or writings which may affect lands, to be placed on record; and, as the statute of frauds forbids such interest to be held or transferred without deed or writing, the system is thus complete. No averment of any right by parol, or by, what is still less, the nature of the fund which pays, or the uses or purposes the property is applied to, can be allowed to stamp a character on the title inconsistent with that appearing on the deed and record, to the prejudice of third persons.

It has been held by our courts, that a person purchasing land with the money of another, accompanied with evidence of his intent that it should belong to that other, should be deemed to create a resulting trust by operation of law: *Gregory's lessee v. Selter*, 1 Dall. 193; *Wallace v. Duffield*, 2 Serg. & R. 525 [7 Am. Dec. 660]; *German's lessee v. Gabbald*, 3 Binn. 304 [5 Am. Dec. 372]. These cases have been relied on by the defendant's

counsel as authorities to sustain the argument, that a trust was here created by operation of law. They form, however, cases of a peculiar character, and one principal ground of them is, that not to give effect to the trust would be to sanction a fraud. But the money with which Capp and Henrie purchased the property was their own. They could appropriate it as they pleased, and they chose to appropriate it to a purchase for themselves individually, and not as partners. Having done so, it can not be defeated by proving, otherwise than by deed or writing, that they held as partners. If a person should employ his own money in purchasing land, and take the deed to himself, it could not be pretended under our statutes, that another would acquire a title to it by proving that such person had intended the land for him, however strong the evidence of parol declarations or acts *in pais* might be, short of part performance by delivery of possession.

It has been contended here that there was a part performance by delivery of possession of the whole stable to Henrie, after the dissolution of the partnership. But the allegation of title, as partners, is not founded on any parol agreement or declaration, but on a supposed inference of law, from the acts of purchasing with partnership money, for partnership purposes, and using it as such: and if that foundation fails, a delivery of possession would be of no avail, for the rule requires a parol agreement, or declaration, to be first distinctly proved. The exceptions to the statute of frauds have gone far enough: and it seems agreed that there would be more danger in extending than in limiting them.

Again, in respect to the delivery of possession, it does not appear, by the defendant's offer, when the dissolution took place, and Capp left the premises; whether these occurred before or after the plaintiff's judgment. If after, it was out of the power of Capp, by any act of his, to defeat the plaintiff's lien. If before, it would seem it was a delivery to the defendant as a mortgage or pledge for the payment of the partnership creditors, not a sale or transfer to him: and to the latter the doctrine of part performance is confined. A mortgage in this state can not be made by parol, even if accompanied with delivery of possession: it must be evinced by some deed or writing: *Bowers v. Oyster*, 3 Penn. 240. The alleged notice to the plaintiff, therefore, had no operation, and left the matter where it previously stood.

In conformity, therefore, with the suggestion of Chief Justice Tilghman, in *McDermot v. Lawrence* [10 Am. Dec. 468], after a

review of the American and English cases on the subject (and, I think, in accordance with the course of legislation in Pennsylvania on the modes of acquiring title to real estate), where partners intend to bring real estate into the partnership stock, we think that intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived.

The defendant further offered to prove that Capp sold out his interest in the livery to Samuel Murray: that the plaintiff was present at the negotiation for the sale, and promised Capp that if he made the sale, he would take Samuel Murray for the debt due on his judgment: that Capp accordingly, after the sale, gave the plaintiff an order on Samuel Murray, which was taken by the plaintiff in satisfaction of the judgment.

After a sale on *venditioni*, and sheriff's deed acknowledged, the purchaser is ordinarily entitled to the land purchased and paid for. The sheriff's deed is conclusive evidence of the right of possession against the defendant in the execution, and all claiming under him after the judgment. If there are matters of defense accruing subsequent to a judgment, and prior to a sale, such as payment and satisfaction, or release, the defendant may obtain relief by motion to the court to stay proceedings, or to set aside the process, or, perhaps, to stop the acknowledgment of the sheriff's deed; but these matters can not be set up to defeat the purchaser's right to possession under the deed. The act of sixth of April, 1802, gives a summary remedy to obtain possession, instead of the former dilatory proceeding in ejectment, and the sheriff's deed is expressly made conclusive evidence of the purchase.

When persons claim by title paramount to the judgment, whether derived from a third person or (by the act of fourteenth March, 1814) from the defendant, prior to the judgment, they may, on making affidavit and entering into cognizance, stay the proceedings before the justice, and have their title tried in the court of common pleas. But this is all the act allows them to do. They can try nothing else. If they succeed in establishing their title, the proceedings are stopped; if they fail, they are bound by their recognizance to surrender up the premises, and the justices are empowered to give possession to the complainant: 3 Serg. & R. 107; 13 Id. 278. It is plain, therefore, that they come into court as actors or prosecutors; they assert a title, and are bound to substantiate it. Nothing else is in issue. The defendant could not go into evidence of anything but his title,

as averred in his affidavit; and if he failed to make that out, he had no right to travel into the matters proposed.

It is supposed that the circumstance of the plaintiff being the purchaser, distinguishes the case from the general rule. The act of assembly, however, applies to all purchasers, whether plaintiff or others. The same inconvenience would result in every instance, if the single issue in this proceeding were intermingled with other disputes, such as whether the plaintiff ever made the promise stated, whether the alleged order was satisfaction and payment of the judgment, and various other matters arising from throwing open the door for the investigation of everything which the party had omitted to bring forward in due season, and in regular order. This point has heretofore been decided in the case of *Arnold v. Gorr*, 1 Rawle, 227, when it was held, that there is no difference whether the purchaser of land at sheriff's sale be the plaintiff or a stranger.

The observations already made apply to the objection of the defendant to the omission in the inquisition. An inquisition being a matter *in pais*, the omission of any material part, by mistake, might be corrected by parol evidence: *Thomas v. Wright*, 9 Serg. & R. 87. The circumstance that no interposition took place to prevent the sale and conveyance of the property by the sheriff, affords a strong presumption that it was by mistake of the jury, and not by design, that the omission occurred, and that on due inquiry it would have so appeared. But at all events, on the express words of the act of assembly, and the principles before stated, I think the present defendant can not take advantage of it on this issue.

Judgment of the circuit court affirmed, and judgment for plaintiff.

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The principal case is a leading one in Pennsylvania. It was cited in *Brownfield v. Braddee*, 9 Watts, 151, and *Braddee v. Brownfield*, 2 W. & S. 272, to the effect, that where the summary proceedings provided for by the act of April 6, 1802, are resorted to for the purpose of obtaining the possession of real estate sold at sheriff's sale, and such proceedings are removed to the court of common pleas upon the affidavit of a third party that he is the owner of the land, it is competent for such third party, upon the trial of the title, to show that he has purchased the plaintiff's title to the land at sheriff's sale, after the commencement of such summary proceedings. In *Kramer v. Arthurs*, 7 Pa. St. 170; *Lancaster Bank v. Myley*, 13 Id. 549; *Ridgway, Budd & Co.'s appeal*, 15 Id. 181; *McCormick's appeal*, 57 Id. 59; and *Lefevre's appeal*, 69 Id. 125, to the effect that parties intending to bring real estate into a partnership stock must do so by writing placed on record, and unless such intent is so manifested, real estate conveyed to them will be considered as held by them as tenants in common, and liable for their separate debts. As between



the parties, however, real estate purchased with partnership funds is treated as partnership property: *Meason v. Kaine*, 63 Id. 335. Real estate held by partners as tenants in common may be sold on an individual judgment, and the purchaser takes the title discharged from the partnership debts: *Filby v. Miller*, 25 Id. 268. The principal case was relied upon in *Erwin's appeal*, 39 Id. 537, and *Abbott's appeal*, 50 Id. 238, to sustain the rule, that a deed made to two parties, conveying to them certain land, conveys it to them as tenants in common, unless it appears from the face of the deed that it was conveyed to them as partnership property.

PAROL EVIDENCE TO VARY WRITTEN AGREEMENT.—General rule is, that parol evidence is not admissible to vary or explain a contract in writing where it is not ambiguous in itself: *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304; *Gardiner M. Co. v. Heald*, 17 Id. 248; *Perrine v. Cheeseman*, 19 Id. 388; *Haven v. Brown*, 22 Id. 208; but mistakes therein may be corrected by parol: *McCurdy v. Breathitt*, 17 Id. 65, and cases there cited.

SHERIFF'S DEED, effect of, by relation: *Jackson v. Ramsay*, 15 Am. Dec. 248, note.

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## HEMMICH v. HIGH.

[2 WATTS, 150.]

A MINOR, TO WHOM A TRACT OF LAND HAS BEEN DEVISED, is not bound by a partition made by other devisees of the same testator of land devised to them, and of his land, by which a portion of both tracts is set off to him, although upon attaining majority, he exercised acts of ownership over the part so set off to him.

EJECTMENT by Joseph Hemmich against William High, to recover a tract of land claimed by plaintiff as devisee of his grandfather. The latter died in November, 1820, leaving to the plaintiff a grist mill and five acres of land, and also an adjoining tract of fifty acres. The balance of his land, about six hundred acres, he left to his three sons, John, David, the plaintiff's father, and Joseph. In April, 1822, the testator's three sons made an amicable partition of the land devised to them, including plaintiff's portion. A portion of the land, other than that devised to plaintiff, was set off to him, and the land devised to him was set off partly to him, and the remainder to his uncles. Plaintiff was not a party to the partition deed, although he knew of the division. It appeared that during plaintiff's minority, he received the rent of the portion set off to him, and that after becoming of age in June, 1826, he leased it and paid the taxes on it for several years, until 1831, when this action was brought. The land set off to plaintiff was greatly inferior in value to that devised to him. Verdict for plaintiff.

By Court, SERGEANT, J. It is contended by the defendant that the conduct of the plaintiff, after arriving at twenty-one, in retaining possession of the tract set out by the draft, and acting as its owner by receiving rents, making leases, cutting wood, and claiming possession, amounted to an acquiescence in the partition of 1822, which divested his title to the land devised: and cases have been cited to show what acts of an infant are void or voidable, and what conduct of his, after arriving at full age, amounts to a ratification of his acts. But the plaintiff was not in any way a party to the transaction, and therefore these authorities have no bearing on the case. The single question is, whether the acts of others, done during his minority and without his participation, shall divest the plaintiff of a title secured to him by the will of his grandfather; and there seems to me to be hardly the shadow of a pretense for it. The conduct of the sons in undertaking to appropriate his property to one of themselves, and select for him in lieu of it a strip of ground inferior in quality and situation, exhibits an utter disregard of his rights, if not a deliberate attempt to defraud. It would require, under such circumstances, a very clear and decided act on his part, made with a full knowledge of his rights, and freed from the influence his situation subjected him to, before he could be deemed to have assented to a substitution so injurious to his interests. Even in persons of full age, acts such as those given in evidence would not suffice to transfer the title to real estate. The property of an infant, if such an attempt could succeed, instead of being peculiarly protected by the law, would be constantly subject to invasion from the secret artifice or open attempts of others who might take a fancy to it. The sons had no right to intermeddle with this property, unless to prevent it for the benefit of the infant. The seizure of it was unjustifiable, and the title thereby acquired being tortious, nothing has occurred on the part of the plaintiff to give it validity. No deed or writing has been executed by him transferring his estate in the land, he is not barred by lapse of time, nor has he been guilty of any collusion or laches, by which, in equity, his title would be postponed.

Judgment of the circuit court affirmed.

## STOUFFER v. LATSHAW.

[2 WATTS, 165.]

AN ARREST MUST HAVE BEEN ORIGINALLY ILLEGAL, or become so by subsequent abuse of it, to constitute duress in law.

LAWS OF THE PLACE where an arrest is made must determine its legality or illegality; and in the absence of proof to the contrary, an arrest upon legal process in another state will be presumed justifiable.

SUBMISSION OF A FACT to a jury without there being some evidence thereof, as one that may nevertheless be found, is an encouragement to err which can not be too closely observed or unsparingly corrected.

ACTION brought by John and Jacob Stouffer against John Latshaw, on six notes. Pleas, payment with leave, etc., duress of imprisonment, and *non est factum*. In 1826 the present plaintiffs brought an action against Latshaw in the court of common pleas of Lancaster county, Pennsylvania; and in 1827, while that action was pending, the plaintiffs sued out a *capias* in Baltimore, Maryland, against the defendant, upon which he was arrested and gave bail. The day following the arrest the defendant gave to plaintiffs the notes on which the present action was brought, in satisfaction of the claim for which the *capias* issued. No evidence was offered of the nature of the bail given by defendant, nor was there any evidence of the laws of Maryland with regard to the legality of an arrest for a cause of action for which an action was pending in another state. The charge of the court and that asked by the defendant's counsel sufficiently appear from the opinion.

*Montgomery and Norris*, for the plaintiffs in error.

*Jenkins and Hopkins*, for the defendant in error.

By Court, GIBSON, C. J. It was accurately charged, that to constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it. It was accurately charged, too, that in the absence of proof to the contrary, the arrest must be taken to have been justifiable under the laws of Maryland, by which its legality is determinable; as a second arrest during the pendency of an action in a foreign country for the same cause is justifiable by the common law, which is the basis of the jurisprudence of that state. Yet, notwithstanding the conceded absence of proof to rebut the presumption in favor of the arrest, its legality was submitted to the jury as an open question. It is doubtless the province of the jury to determine the effect of the evidence, but it is the province of the court to determine its competency; and the

right to determine what is evidence and what is not, necessarily includes a right to determine whether there is any evidence to the point proposed. Nor is it an invasion of the prerogative of the jury to instruct them, in a proper case, that there are legal presumptions of fact which it is their duty to draw. By the pleadings, all that is necessary to constitute duress was a part of the case which the defendant had taken upon himself to prove; and, failing to produce his proof, the fact was to be taken as against him; but, instead of being instructed to that effect, the jury were directed to consider the matter at large, which had a direct tendency to mislead them as to the *onus probandi* and the legal result of the proof. To submit a fact destitute of evidence, as one that may nevertheless be found, is an encouragement to err which can not be too closely observed, or unsparingly corrected.

Of oppression by an excessive use of the process, there was no room for a pretext, in the evidence returned on the commissions; nor does the cause seem to have been put on that ground. But though actual duress was out of the question, it was put to the jury to say, whether there was not evidence of such constraint, though less than actual duress, as would induce a chancellor to order the securities to be delivered up: at least such I take to be the drift of the direction. The defendant's counsel prayed an instruction, "that, in equity, if a man enter into a note, though the terror and force are not sufficient to make it duress at the common law, yet it may be relieved against; and if the jury believe that the defendant, to procure his discharge from illegal arrest, was compelled to execute the notes sought to be recovered, the verdict should be in favor of the defendant." To this jumble of legal, and imaginary equitable duress, the court responded in the affirmative; saying: "A man ought to be relieved from the payment of any obligation given by him under the circumstances stated in the proposition; that is, if it appear clearly that the arrest was illegal, and that to procure his discharge from such illegal arrest he was compelled to give the obligation in question."

Now, if the arrest were illegal and used to extort the notes in question, there could not be a more decisive case of duress at the common law; and it would be idle to talk of a less degree of restraint as a ground of relief applicable to such a case in equity. The design of the prayer was palpably to obtain the sanction of the court to the abstract principle, that there may be relief in equity for a less degree of constraint than is neces-

sary to constitute duress at law; and though the court lent its sanction on the inconsistent condition that the arrest be illegal and for purposes of extortion, yet the qualification being repugnant to the principle, must be rejected. If the direction meant not that there is a species of milder duress, which may be the subject of equitable cognizance exclusively, it meant nothing; and in any aspect it had an irresistible tendency to confuse and mislead. The authority relied upon in the argument is the case of *Nicholls v. Nicholls*, 1 Atk. 409, in which it is given, as the substance of the decree, that "though a man is arrested by due process of law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance, which was not under consideration before, equity will construe it a duress, and relieve against a conveyance executed under such circumstances." Is not that also a case of duress by the common law. The spontaneous act of a man in arrest by due course of law, though for no actual cause of action, may not be avoided for duress, because, as is said in 1 Leon. 61, an action on the case lies for the malice; but, as it is laid down in 1 Roll. Abr., b. 1, "If a man, lawfully in prison, makes an obligation against his will and consent, he may avoid it for duress." And the distinction rests on a cardinal principle of the law, which declares an arrest on due process not to be a trespass however malicious it be, but admits that it may become so by a subsequent abuse of the authority. To make "a wrong use of an arrest," therefore, by obliging the party arrested "to execute a conveyance which was not under consideration before," is to make the arrest illegal from the beginning; and the wonder is, that equitable relief should have been given in *Nicholls v. Nicholls* for what was clear duress and remediable at the common law.

It was said by Lord Hardwicke, in *Roy v. The Duke of Beaufort*, 2 Atk. 193, that duress is not remediable in equity, because, as he remarked, if there were any illegal advantage taken of the obligor when he was in custody, he might be relieved at law, and there was no occasion for a suit in equity. It is certainly not an independent ground to go into that court, though there may be cases where it is necessary to determine the question of its existence incidentally on an objection to a deed; but the expression of Lord Hardwicke undoubtedly indicates no opinion favorable to the doctrine of equitable duress. I take it, that nothing of the sort would authorize a decree to have the security delivered up, or any other that would deprive the party of

an advantage to be had from it at law. In the report of *Nicholls v. Nicholls*, if such it may be called, neither the circumstances of the case nor the grounds of the decree are stated, and we are left in the dark as to the nature and extent of the relief. That equity would refuse to execute a contract procured by a less degree of constraint than is necessary to duress, may readily be conceived; but that it would interpose to destroy the security at law, especially if it were, as here, for a *bona fide* duty, is a proposition that wants the confirmation of authority. No such principle was established in *The Attorney-general v. Sothom*, 2 Vern. 497. That was the case of a bond given in the prerogative court under very peculiar circumstances. An application of the obligor for administration of his uncle's estate, was resisted by one named as executor in a will not to be found, but alleged to contain certain charitable bequests. The nephew, being told by the prerogative judge that he should have the administration, but it was expected of him that he would secure the charities, executed the bond in question, and thereupon had sentence pronounced for him, which was affirmed at the delegates. On cross-bills filed, the one to have the benefit of the bond, and the other to have it delivered up, Lord Keeper Cowper said, that a bond procured through force of terror, "though not so as to make it *per duress*," ought to be set aside, or at least not carried into execution; and that though a judge may fairly mediate an accommodation, yet that to put terms on pronouncing judgment is contrary to *magna charta*.

In conclusion, it is said: "There being no proofs in the cause that there was such a will, and it likewise appearing by the proofs that the testator had afterwards changed his mind, thereupon the lord keeper declared he was not satisfied to decree performance of the bond, nor set it aside, and dismissed both bills." Now, though he seems to have thought that a bond thus procured might be set aside, he refused to do so in the most favorable state of the facts for the principle of which the case was susceptible; and had the proofs shown the existence of the will without any change of testamentary purpose, there is little doubt, from what was done under circumstances less favorable to the obligee, that the bond would have been decreed, though obtained by compulsion; and even as it was, the lord keeper did much the same, by leaving the obligee to his action at law, against which there could be no defense: *Hinton v. Hinton*, 2 Ves. 65, was the case of a bill for specific performance; and even there, the fact that the agreement was made in jail,

was not deemed an objection to the extraordinary interposition of the court; and in *Wilkinson v. Stafford*, 1 Ves. jun. 33, the compromise objected to for having been made in prison was introduced incidentally as part of the defense. In no case have I found an authority for the notion that there is a sort of equitable duress which may be made the foundation of an injunction against proceeding at law. Perhaps the actual restraint of a party's liberty may be a circumstance, in connection with others, to raise an imputation of fraud, which however is a distinct ground for setting a contract aside; but even that has no place where the imputation is rebutted by the existence of a *bona fide* debt or duty. What then is the case here? The plaintiff is demanding the fruit of his securities in actions at law, without needing or desiring assistance from the equitable powers of the courts; and he is not to be told of an equitable duress to cut him out of a debt whose existence and fairness are not disputed. But there was not a particle of evidence that any constraint was put upon the defendant; and in that view, also, the cause was erroneously put to the jury.

Judgment reversed, and a *venire de novo* awarded.

Cited in *Delamater's Estate*, 1 Whart. 374; *Dougherty v. Jack*, 5 Watts, 456, and *Miller v. Miller*, 68 Pa. St. 493, to the effect that there is no duress *per minas* in equity, which does not exist at law. And in *Prescott v. Union Ins. Co.*, 1 Whart. 407; *Evans v. Mengel*, 6 Watts, 74, and *Moore's Executors v. Patterson*, 28 Pa. St. 513, upon the point that the reference of a matter of fact to a jury, about which there is no proof, is erroneous.

DURESS.—Actual violence is not essential to: *Watkins v. Baird*, 4 Am. Dec. 170. See, generally, as to what constitutes: *Edwards v. Handley*, 3 Id. 745; *Blair v. Coffman*, 5 Id. 659. Of one's property: *Collins v. Westbury*, 1 Id. 643. Deed obtained by, may be avoided by the grantor or his heirs entering within twenty years: *Meek v. Atkinson*, 19 Id. 653. For an extended consideration of the subject of duress, as to what constitutes it and what does not, see the note to *Hatter v. Greenlee*, 26 Id. 374.

ARREST, who liable for wrongful: *Bissell v. Gold*, 19 Am. Dec. 490, note.

## RAMSEY'S APPEAL.

[2 WATTS, 228.]

JUDGMENTS MAY BE SET OFF against each other, if the rights of third persons are not affected thereby; but where the rights of an equitable assignee for value would be affected, this right can not be exercised.

THIRD PERSONS CAN NOT TAKE ADVANTAGE of an irregularity in the assignment of a judgment, if the assignor makes no objection.

UNDER THE ACT OF 1705, a defendant who establishes a set-off in excess of plaintiff's demand, has no lien upon the latter's real estate for the pay-

ment of such excess. It can only be made a lien by judgment in *scire facias*.

**AN INQUISITION IN CASE OF ESCHEAT**, which fails to find that the decedent died intestate, and without heirs or any known kindred, is a nullity, and a transcript of such finding is not a lien on the lands of him in whose hands the estate is found to be.

**MECHANICS, TO PRESERVE THEIR LIEN** for work performed, must file their claim within six months from the completion of the building.

**A CREDITOR WHO MAY AT LAW CONTROL** the application of two or more funds will not be permitted in equity to use his legal advantage so as to exclude the demand of a fellow-creditor whose legal recourse is to but one of them.

**A CORPORATION IS ENTITLED TO HAVE A JUDGMENT** in its favor against one of its stockholders satisfied out of the proceeds of a sale of his real estate; and other judgment creditors who are thus deprived of the payment of their judgments are entitled to be subrogated to the rights of the corporation, so as to enable them to levy and sell the corporate stock of their debtor.

**APPEAL** from a decree of the court of common pleas of Cumberland county, distributing the proceeds of certain real estate of William Ramsey, deceased, among his creditors. The Chambersburg bank having the eldest judgment against Ramsey, claimed the entire proceeds. Subsequent judgment creditors insisted that, inasmuch as Ramsey held stock in the bank upon which its judgment was a lien, the value of the stock should be deducted from the bank's judgment, and the balance paid out of the money in court. The general creditors insisted that the bank stock was a personal fund to which they were entitled, and that the judgment should be paid out of the money. The bank agreed to take either the stock or money, and Ramsey's administrator not consenting to either, the court decreed that the bank stock should be deducted at its par value, and the balance of the judgment paid from the money. The Agricultural bank had the next judgment and lien. The payment of this was objected to, because Ramsey had judgments against the bank to its full amount. It appeared that a moiety of the bank's claim had been assigned by four of its trustees to the bank of the United States, and thereupon it was objected, that to make an assignment, five trustees were necessary. The court being of the opinion that the informality in the assignment could not be taken advantage of by creditors, refused to allow the judgment in Ramsey's favor to be set off so as to affect the moiety assigned to the United States bank. The court refused to allow a judgment of award made in a matter of reference entered into between Ramsey and the administrator of Andrew



Mitchell. The facts in relation to this judgment are stated in the opinion.

The commonwealth claimed a lien on the money by an inquiry, in a proceeding to ascertain the amount of the estate of Jonathan Huston, escheated to the commonwealth; but this claim was rejected. James Buchanan also claimed a lien upon the property sold by virtue of a mortgage from Ramsey. It appearing that Ramsey had other real estate, which had been sold, and that the proceeds realized therefrom were sufficient to pay all the prior liens to the mortgage, the mortgagee objected to an appropriation of the money realized from the sale of the mortgaged premises to the payment of such other debts, but claimed that they should be paid out of the money in the administrator's hands, that had been realized from the sale of the other property. If this position could not be sustained, Buchanan asked to be subrogated to the rights of such other creditors to the money in the administrator's hands. The court decreed that he should be so subrogated. The other facts are stated in the opinion.

*Watts, Alexander, and Carothers*, for subsequent judgment and general creditors.

*Biddle and Ellmaker, contra.*

By Court, GIBSON, C. J. Specific objections are made to the allowance or disallowance of particular liens, which are to be disposed of in their order; and first, of the lien held by the bank of the United States, as an assignee of the moiety of a judgment obtained by the Pennsylvania Agricultural bank. Judgments obtained against the latter bank for more than a moiety of the debt assigned, were held by the debtor in his lifetime, and ought now, it is contended, to be set off without regard to the rights of the bank of the United States under the assignment, as it is supposed that an equitable transfer can not stand in the way of the exercise of a legal right by the debtor. But there is a fallacy in supposing defalcation, in a case like the present, to be a legal right. Judgments are set against each other, not by force of the statute, but by the inherent powers of the courts immemorially exercised, being almost the only equitable jurisdiction originally appertaining to them as courts of law. An equitable right of setting off judgments, therefore, is permitted only where it will infringe on no other right of equal grade; consequently it is not to affect an equitable assignee for value. As to the objection, that the assign-

ment was executed but by four of the trustees, it is sufficient that the bank, whose agents they were, has not contested the transaction, as it was bound to do in a reasonable time had it meant to disaffirm it. The necessity of an early signification of dissent from an act done without authority, was recognized by this court in *Gordon v. Preston*, at the last term, for the Lancaster district: 1 Watts, 385 [26 Am. Dec. 75].

Exception is taken to the disallowance of a judgment on an award of money to the defendant, in an action in which the debtor was plaintiff. The reference was under the act of 1705, by the first section of which the jury are directed, when a set-off has been established for more than the plaintiff's demand, to find a verdict for the defendant, "and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant." The certificate thus made, is an appendage to the verdict, but no part of it, or of the premises on which the judgment is rendered; for the judgment is not *quod recuperet*, but that the defendant go without day. On the contrary, it is expressly made a distinct and independent cause of action by *scire facias*; and though a debt of record, it is not necessarily a lien, as was shown in *Allen v. Reesor*, 16 Serg. & R. 10, being made so only by judgment on a *scire facias*. Such is the proceeding where a surplus is found for the defendant by a jury. By the third section of the same act, it is provided that the adjustment of mutual accounts may be referred by rule of court to arbitrators whose award shall have the effect of a verdict; "and the party to whom any sum of money is thereby awarded, shall have judgment or a *scire facias* as the case may require, as is hereinbefore directed concerning sums found and settled by a jury." That is, *reddendo singula singulis*, the plaintiff shall have judgment directly for money awarded to him, but the defendant shall have judgment for money awarded to him only intermediately, on a *scire facias* founded on the award, as in the case of *scire facias* founded on the certificate of a jury. Why the *scire facias* should have been introduced in either case, can be explained only on the principle of a repugnance felt at an early day for an incongruity so striking as the direct recovery of money by the defendant; but the legislature has prescribed it, and it is not for the courts to dispense with it. Though judgment was signed on the award, it was not for the money awarded, but that the defendant should be discharged from the action; and by this he was left to become an actor in turn as the prosecutor of a *scire facias*. It is too plain then for

further remark, that the part of the award which charged the plaintiff was not a lien.

Exception is taken also to the disallowance of the supposed lien of certain proceedings in escheat. By the second section of the act of the twenty-ninth of March, 1823, an inquisition filed in the proper office, and finding an escheat to have occurred, is declared to be a lien on the real estate of those in whose hands any part of the escheated estate is found to be. In the inquisition produced here, it is not found that the decedent died intestate, and without heirs or any known kindred; but that is said to be no more than an irregularity which can not be admitted collaterally to destroy the properties of the instrument, just as irregularities in a judgment can not be admitted collaterally to destroy the incident of its lien, while the judgment itself is suffered to stand. But a judgment itself may be treated as a nullity when it is deficient in an integral part; as may be collected from *Helvets v. Rapp*, 7 Serg. & R. 306, the record of which was barely saved from that consequence, by being found to contain the substance, though not the form, of all the essential parts of a judgment: and in *The Philadelphia Bank v. Craft*, 16 Serg. & R. 347, where a judgment confessed for a sum to be ascertained by the prothonotary, was held not to give a lien from the date, we have the very case. That is not all. By the act on which the lien depends, a copy of the inquisition is to be filed in the prothonotary's office for purposes of lien, only when an escheat is found to have occurred; so that the omission of that indispensable fact is made fatal to the argument by the very words of the statute.

Exception is taken too, but not pressed, to the disallowance of certain mechanics' liens, in perpetuation of which claims had not been filed within the six months, nor actions brought—to state the facts, is to show that the liens had expired.

But exception is confidently taken to the subrogation of the mortgagee, on whose sale the fund is brought into court, to the rights and capacities of the judgment creditors who are prior to him, and whose liens bound not only the mortgaged premises, but other lands of the mortgagor, previously sold by his administrator under a decree of the orphans' court, the proceeds of which are in his hands, equally subject to the judgments.

I do not concur with the counsel of the mortgagee that the administrator's sale was *ipso facto* satisfaction of them *pro tanto*. No such effect is given to it by the statute which directs it, the land sold being but exempted from the debts of the decedent

in the hands of the purchaser; and it was held in *The Bank of Pennsylvania v. Winger*, 1 Rawle, 295 [18 Am. Dec. 633], that it is one thing to divest a lien, and another to discharge the debt. But if there is any rule or principle of equity plainly, positively, and incontrovertibly established on the basis of reason and authority, it is that he who may at law control the application of two or more funds, shall not be suffered to use his legal advantages in a way to exclude the demand of a fellow creditor, whose legal recourse is but to one of them. It is one of the most benign influences of equitable jurisdiction, that it adjusts the application of jarring liens according to their priority and value, in such a way as to produce a degree of satisfaction to all commensurate with their rights; than which there can be no purer justice. Put it that to free his other lands from incumbrances, the mortgagor had procured the prior judgment creditors so to apply their liens as to exclude the mortgagee from the benefit of his security altogether—would not common honesty have called upon the courts to rescue their process from such abuse? The mortgagor would have felt himself insulted by the imputation of such an arrangement. And who are they that attempt to effect the same thing by setting up their legal rights as matters not to be touched by the doctrine of subrogation? They are the general creditors of the mortgagor, who have succeeded to his rights by the operation of the intestate laws, and stand in his place as the residuary owners of his title. It is certain that the doctrine is one of mere benevolence, and that it is not to be extended to the infringement of legal rights; as, for instance, by restricting a creditor to an inadequate fund, or in compelling him to take satisfaction in any way prejudicial to him. But what are the legal rights of the creditors? They are such as affect each other in the distribution of the assets, according to the priority of classes; and they are consequently subordinate to equities which affected the debtor, whom they collectively represent. The only error discernible in any part of the decree is, in the failure to apply the doctrine in its greatest breadth to the judgment of the Chambersburg bank. Were the stock pledged to that bank of a legal, definite, and current value, the principle of satisfaction by defalcation might have been adopted with propriety; or had the administrator consented to let it go in satisfaction at the par or any other stipulated value, all would have been well enough, as he would have been answerable to the general creditors for any loss that might have occurred by a *devastavit*. But the court could not deprive those creditors of the possible benefit of an advance on a sale.

To do exact justice to all, it will be necessary to turn the stock into cash by an execution on the judgment, without, however, delaying the bank in the mean time. It is therefore ordered, that so much of the decree as relates to the satisfaction of that judgment be reversed; that the judgment stand for the use of the mortgagee, who is subrogated to the rights and securities of the bank, with leave to proceed to execution of the stock pledged, crediting the proceeds on his mortgage; that the bank be permitted to take its money out of court in the mean time; and that the residue of the decree be affirmed.

Decree accordingly.

In *Moroney v. Copeland*, 5 Whart. 419, the rule of subrogation adopted in the principal case was cited with approval, and applied to the facts of that case. Also, in *Coates' appeal*, 7 W. & S. 102, and *Horton v. Miller*, 14 Pa. St. 257, the rule stated in the principal case as to equitable jurisdiction of courts of law to set off cross-judgments, is referred to with approval. In *Filbert v. Hawk*, 8 Watts, 443, it was held that the assignee of a judgment takes it subject to all the equities which exist between the parties thereto at the time of the assignment, and that if the defendant in such judgment had, prior to the assignment, obtained a judgment against the plaintiff upon an independent cause of action, it was such an equity as could be made available as a defense against the assignee, in a *scire facias*, upon the judgment assigned to him. In order to reconcile this rule with that adopted in the principal case, it is necessary that the assignment in the principal case from the Agricultural bank to the United States bank should have been made prior to the time that Ramsey recovered his judgment against the former bank. This does not so appear from the facts as stated in the principal case, but in *Filbert v. Hawk* it is said: "The case [*Ramsey's appeal*] is imperfectly stated, as reported, in not showing that the assignment to the bank of the United States was prior, in point of time, to Ramsey's obtaining his judgment against the Agricultural bank. But it is clear, from the reasoning of the chief justice, in delivering the opinion of the court, that the fact was so, for without that, the equity of the Bank of the United States could not have been equal to Ramsey's." Where an assignment is made for the benefit of creditors, the latter stand in no better position than their debtor, and are affected by the same trusts and equities with which he was affected: *Twelves v. Williams*, 3 Whart. 493; *Garrison's appeal*, 2 Grant Cas. 218; *Delaware & Hudson Canal Co.'s appeal*, 38 Pa. St. 517, all citing principal case.

In *Blair v. Mathiott*, 46 Pa. St. 265, it was held that an obligor in a bond can not defalcate against the assignee of an assignee, a claim or set-off, which he holds against the first assignee, citing principal case.

**SET-OFF.**—The judgment of a justice may be set off against a judgment of a court of record, if the time for appeal has expired: *Coze v. State Bank*, 14 Am. Dec. 417. In the note to *Duncan v. Bloomstock*, 13 Id. 729, the question of setting off mutual judgments is discussed, and it is there stated that courts of law have long exercised an equitable power, incidental to their jurisdiction over their suitors and officers, and entirely independent of any statute of setting off mutual judgments against each other.

**SUBROGATION**, doctrine of, is founded on principles of equity, and not on contract: *Cheeseborough v. Millard*, 7 Am. Dec. 494.

## KISLER v. KISLER.

[2 WATTS, 823.]

TRUSTS RESULT BY IMPLICATION OF LAW in two cases only: 1. Where a purchaser of land has paid the purchase price with his own money, and taken the conveyance in the name of another, or where he has paid with the money of another and taken the conveyance in his own name; and, 2. Where a trust has been declared of part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue.

PURCHASE OF LAND BY A GUARDIAN, which he declared at the time to be for the use of his ward, is not such a trust as can be enforced by the ward.

ACTION on the case brought by Samuel Kisler against Samuel Etter, the administrator of Henry Kisler, deceased. Henry Kisler was the guardian of plaintiff, who desired to purchase the Fisher farm. They attended the sale, which took place in 1828, and both bid for the property, and it was sold to Henry, who at the time declared that he did not buy it for himself, but for his ward, Samuel; and the latter assented to the purchase and procured a friend to bail Henry for the performance of the conditions of the sale. At that time Samuel was twenty years of age. About one month afterwards Henry resigned as guardian of Samuel, and one Garretson was appointed in his place. Thereupon Henry offered to convey the farm purchased, to Garretson for the benefit of his ward, upon the same terms at which he purchased it, but he refused to take it, and Henry then sold it for two thousand dollars more than he paid for it. Prior to the resale Samuel offered to pay Henry the amount that he had paid for the property, and demanded of him a conveyance of it, which was refused. Judgment was to be entered for plaintiff, if he was entitled to recover, for two thousand dollars. The court gave judgment for defendant.

*Lewis*, for the plaintiff in error.

*Gardner*, *contra*.

By Court, GIBSON, C. J. In England, a trust results by implication of law but in two cases: the first where the purchaser has paid the price with his own money, but taken the conveyance in the name of another—or where he has paid with the money of another, and taken the conveyance in his own name; and the second, where a trust has been declared of but part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue. These are specific cases of resulting trusts; and according to *Lloyd v. Spillet*, 2 Atk.

150, they are the only ones. Cases have undoubtedly been confounded with them, though readily distinguishable from them, in which a specific lien has been given for purchase money withdrawn from a fund towards which the purchaser stood in the relation of a trustee. A purchase by a husband bound to purchase and settle, has been presumed to have been made in contemplation of a settlement; and in clear cases trust money paid away in a purchase, has been followed into the land, even on parol proof. But though the purchaser is spoken of in those cases as a trustee, just as a mortgagee is spoken of as a trustee, the equity of the party beneficially entitled is to have his money and not the land; and such was the prayer in *Lench v. Lench*, 10 Ves. 512. But with us all distinction on this head is overlooked or disregarded; and it seems to be settled by *Gregory v. Setter*, 1 Dall. 139;<sup>1</sup> *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372]; and *Duffield v. Wallace*, 2 Serg. & R. 521,<sup>2</sup> that a purchase with trust money, in whole or in part, gives the owner of the money a correspondent ownership of the land. How that was supposed to follow—whether from the inability of the courts to order a sale, or from the license left to parol declarations of trust by our statute of frauds—it matters not to inquire; for though the bounds of these resulting interests have been sensibly enlarged, the trust is still considered to arise from the ownership of the purchase money. That it has been raised on no other foundation, shows this ownership to be the efficient cause, and not the direct creative power of an express declaration, which may, however, have a legitimate influence on the event, but only as a confession of the ownership. By any other hypothesis, what we call a resulting trust would cease to be an implied one. That an express trust may be declared by parol, I am not disposed to deny; but if declared by the grantee and not the grantor of the legal estate, where its object is not to indicate a beneficiary purpose by the grantor in favor of the *cestui que trust*, it must, to be binding, be made in consideration of payment of the purchase money by the *cestui que trust*; and then it would produce no other effect than the law would produce without it.

Probably it was the object of the statute to sustain a gift of the land by the grantor to a person not named in the conveyance; but not a gift by the party purchasing, the execution of which could not be enforced for want of a consideration. If I proclaim that I hold my house for B., it is evidence of a trust

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1. 1 Dall. 193.2. *Wallace v. Duffield*, 2 Serg. & R. 521; 7 Am. Dec. 600.

which may, however, be rebutted by proof that the beneficial ownership is not in him; for such a declaration is not binding as a gift even of a chattel. But if I convey my house to A., with parol direction to hold it for B., a confidence arises which it would be unconscionable in A. to violate; and this would constitute that species of express parol trust, which it was the object of our statute to sustain. But if I proclaim that I hold my house for B., on terms of conveying it to him when he shall reimburse me what I paid for it; this is not a trust, but a contract of sale within the operation of the prohibitory clause. Now what is the case put before us? Had the ward reposed on his guardian's promise to purchase the property for him, it would have been strong for him on another ground. There would then have been a trust *ex maleficio* from the conduct of the guardian in keeping the ward back as a bidder, and, perhaps, getting a better pennyworth of the estate by seeming to buy it from him. Such a trust seems to be recognized in *Lloyd v. Spillet*, 2 Atk. 148; *Peebles v. Reading*, 8 Serg. & R. 492; and was actually enforced in *Brown v. Dysinger*, 1 Rawle, 408. It arises from the artifice of the party to be affected, in procuring the title, and not, as Mr. Justice Todd supposed in the last mentioned case, from the contract; so that it is obviously not related to those cases which are the usual subjects of contest under the statute of frauds. But as there was in fact no prejudice to the ward, who appeared at the sale and procured another friend to bid for him, he has not an equity on that ground. When the estate was struck down then, it was the property of the guardian; and what was the arrangement into which the parties presently entered? The guardian declared the purchase to be for the benefit of the ward, who was present and assented; upon which the guardian paid one hundred dollars of his own money on the bargain, and gave security to perform the conditions of the sale, while the ward, who furnished no part of the consideration, procured a friend to be his surety. Now what is such a case? It is plainly that of one who agrees to sell his land for what he gave for it, between whom and his vendee there is no other trust than that which always accompanies a sale till the conveyance is executed. If I declare that I hold my house for B., it is evidence of a trust, because it is evidence that he has paid for it. If I declare that I hold it for him, provided he pay me a stipulated price, my declaration is evidence of a parol sale, which even our statute of frauds makes good for nothing.



Of what importance, then, is the omission in it of the seventh section of the British statute? It gives room for a declaration of trust by parol; but it does not make that a trust which was not a trust before. It seems to me the "declarations or creations of trusts or confidences," prohibited by the British statute and tolerated by our own, are such as the grantor of the legal estate is competent to make, as a further disposition of the beneficiary interest, and not the confession of a condition or agreement subsequently fastened on the title by the grantee. The first may be evidence by the declaration of either party to the conveyance, with the assent of the other; and it vests an equitable title under our statute. But were the second permitted to have an effect forbidden to any other executory contract for the title, it would be pregnant with all the danger intended to be guarded against by either statute. Even when restrained to gratuitous trusts expressed at the execution of the conveyance, these parol declarations will be found sufficiently introductive of frauds and perjuries. But, with the qualifications indicated, they may certainly be sustained by parol proof. In other cases, the declarations of the grantee are admissible under our act, as they are admissible under the English statute; namely, as confessions by the party of a fact from which the law implies a trust, but does not raise it from their immediate and necessary effect. In *Peebles v. Reading*, a case like the present, except that the party claiming the trust had been the owner of the land, it was held that there was no resulting trust; but it seems to have been thought that there might be an express trust by force of the undertaking to purchase and convey: yet the judge who delivered the opinion of the court, at the same time considered the supposed *cestui que trust* as an ordinary purchaser affected by delay in seeking an execution of the contract, which he could not be if he were the beneficiary owner of the equitable title.

It is not easy to reconcile all the positions taken in that case. The admissions and effect of parol declarations seem to have been considered as peculiar to our practice, though it is known that they were received in *Halcott v. Markant*, Prec. in Ch. 168; *Wilson v. Foreman*, 2 Dick. 593; and *Lench v. Lench*, already quoted, but admitted as confessions, by a trustee, of a fact, as the groundwork of a legal implication. Being equally admissible in the English court of chancery, it is not easy to see what additional force they can have here as direct declarations. An agreement to convey a title to be acquired and paid for here-

after, may be specifically enforced, if the externalis of the contract be such as the statute allows of; but it is no more a trust than is an agreement to pay a stipulated price for a title acquired already. I am unable to discover anything in *Gregory v. Setter*, or *German v. Gabbald*, like a peculiar effect given to the purchaser's admissions; though in the latter, the restricted nature of the provisions in our own statute of frauds is adverted to as putting the question of their competency at rest; and in this respect they are received perhaps less scrupulously here than in England. But in these two cases the trust was held to spring from the ownership of the purchase money, and not from the direct effect of any supposed declaration; consequently, considerations depending on the difference of statutory provisions did not enter into the question; and notwithstanding the declarations were used in evidence, the trust was still considered as a legal implication. But in *Duffield v. Wallace*, the chief justice resorted to the express declaration of the purchaser to supply what he considered a deficiency in the usual ground of implication, arising from the fact that payment was made but in part with the funds of the *cestui que trust*; but this resort was unnecessary, for notwithstanding former doubts, it seems to be settled by *Ryall v. Ryall*, 1 Atk. 59; *Bartlett v. Pickersgill*, 4 East, 577, note; and *Lane v. Dighton*, Amb. 409, that the estate may be charged *pro tanto* with a part of the purchase money. The other judges, however, put the cause on the ownership of the money; and thus we see that no greater effect has been given by our judges to parol declarations of the grantee than has been given to them under the British statute. And it is fortunate that such has been the course of the court, for the danger to be apprehended from allowing to these the force of a direct conveyance has been conceded to be as great as could flow from establishing any other parol contract of sale. We have, then, an ordinary parol agreement to convey on being reimbursed the price paid, which is clearly without the statute of frauds.

Judgment affirmed.

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Cited in *Sidle v. Walters*, 5 Watts, 391, and *Haines v. O'Connor*, 10 Id. 320; to the effect that mere declarations of a party that he purchases land for another without any previous agreement, or without any advance of money for the purpose, is not such a transaction as will raise a trust which equity will enforce. In *Robertson v. Robertson*, 9 Id. 35, the division by the principal case of trusts which result by implication in law, into two classes, was approved. In *Edwards v. Edwards*, 39 Pa. St. 384, the principal case was relied upon to sustain the position, that when two or more parties jointly purchase a piece of land, they become tenants in common thereof. Also in *Fox*

*v. Hefner*, 1 W. & S. 378, and *Jackman v. Ringland*, 4 Id. 150, the mere violation of a parol agreement was held not to be sufficient for equity to decree a party a trustee, citing *Kisler v. Kisler*. Also relied on in *Morey v. Herrick*, 18 Pa. St. 129, to sustain the doctrine that a trust results in favor of a party who furnishes money to another with which he purchases property, is in his own name. In *Leshey v. Gardner*, 3 W. & S. 319, it was held that a trust, as to real estate purchased at sheriff's sale, can not be established by parol, citing principal case. In *Williard v. Williard*, 56 Pa. St. 124, the principal case was thus referred to: "In *Kisler v. Kisler*, 2 Watts, 323, a well considered and a leading case, the late Chief Justice Gibson brought into view very distinctly the difference between a proper trust entering into an estate at the time of the conveyance, and 'a condition or agreement subsequently fastened on the title by the grantees;' fully conceding the competency of parol evidence to prove the former by way of the confession of the trustee of the facts as a groundwork for the legal implication. Since *Kisler v. Kisler*, all the cases, and they are numerous, take the distinction between facts which constitute a trust entering into the estate at the time of its acquisition, and those merely indicating a contract to convey, whether made before or after the purchase."

RESULTING TRUST arises in favor of one furnishing consideration on purchase of land by another: *Foote v. Colvin*, 3 Am. Dec. 478; *Jackson v. Morse*, 8 Id. 306; may be shown by parol: *Wallace v. Duffield*, 7 Id. 660; *Pritchard v. Brown*, 17 Id. 431; see *Towles v. Burton*, 24 Id. 409, note 413; can not be raised to a grantor, contrary to the express terms of his conveyance: *Squire v. Harder*, 19 Id. 446.

## HOY v. STERRETT.

[2 WATTS, 327.]

ONE WHO ERECTS A MILL AND DAM upon a stream, does not, by mere priority of occupation, acquire such an exclusive right in the stream as to enable him to maintain an action against a person erecting a mill and dam above his, by which the water is partly diverted and he thereby injured.

USE OF WATER IN A FLOWING STREAM is open to all, subject to the restriction, that a person is not permitted to use it to the injury of those through whose land it passes.

A RIPARIAN PROPRIETOR CAN ACQUIRE NO EXCLUSIVE PRIVILEGE in running water by mere priority of appropriation.

EVERY RIPARIAN OWNER is entitled to use the water of a stream flowing through his land, although the owner of a mill lower down on such stream is injured thereby, provided such use is ordinary and proper. Such injury is *damnum absque injuria*.

AN IMPROPER OR MALICIOUS USE of flowing water by one riparian proprietor renders him liable in damages to another lower down on the same stream.

ACTION on the case for a nuisance, brought by Hoy against Sterrett. In 1793, Hoy built a small mill upon a stream of water, and continued to occupy and use it for thirty years or more, when Sterrett, who was the owner of the land above, on

the same stream, built a mill and dam thereon, much larger than plaintiff's, and by means of which the water was detained, to the injury of Hoy's mill. The court instructed the jury, that if the injury to plaintiff's mill was occasioned by the detention of the water in Sterrett's dam for its ordinary and proper use for mill purposes, it was *damnum absque injuria*; but if the water was detained carelessly or maliciously to Hoy's injury, plaintiff was entitled to recover.

*Potter*, for the plaintiff in error.

*Valentine and Blanchard*, contra.

By Court, ROGERS, J. A person erecting a mill and dam upon a stream of water, does not, by the mere prior occupation, gain an exclusive right, and can not maintain an action against a person erecting a mill and dam above his by which the water is in part diverted, and he is in some degree injured: *Platt v. Johnson*, 15 Johns. 213 [8 Am. Dec. 233]. A contrary principle would be very pernicious, particularly in a new country; for the necessary effect will be to impair the value of all the land through which the stream passes. The elements being for general and public use, when the benefit is appropriated to individuals by occupancy, this occupancy must be regulated and guarded with a view to the individual rights of all who have an interest in its enjoyment; and the maxim, *sic utere tuo ut alienum non lædas*, must be taken and construed with an eye to the natural rights of all: 15 Johns. 213. The use of the water is open to all, with the necessary restrictions that no person is permitted to enjoy it to the injury of those through whose land the stream passes. That no riparian proprietor gains any privilege by mere priority of appropriation, is a principle now well established; although the opinion entertained by some, that a riparian proprietor, who occupies a mill-site, can secure by such priority of occupation advantage which he could not claim provided any other riparian proprietor, above or below, had before appropriated the water, is not without countenance from respectable authority. In 2 Bl. Com. 403, the commentator says, if a stream of water is unoccupied, a person may erect a mill thereon, and detain the water; yet not so as to injure his neighbor's mill, for he has, by the first occupancy, acquired a property in the current. In *Hatch v. Dwight*, 17 Mass. 289 [9 Am. Dec. 145], there is a *dictum* of Chief Justice Parker to the same effect. And this would also seem to be the opinion of Justice Duncan, in *Strickler v. Tbd*, 10 Serg. & R. 69 [13 Am. Dec. 649]. Subsequent

decisions, however, have ruled the point otherwise. In *Palmer v. Mulligan*, 3 Cai. 307 [2 Am. Dec. 270], and *Ingraham v. Hutchinson*, 2 Conn. 592, and *Bullen v. Burrell*, 2 N. H. 217, the court put the right on the presumption arising from length of possession. They entirely discountenance the idea that the plaintiff acquired any right by mere prior appropriation.

The subject of prior occupation was also considered in the case of *Martin v. Bigelow*, 2 Aik. 184 [16 Am. Dec. 696], and it was ruled that the mere prior occupancy of the water by the defendant, did not prevent the plaintiff from using the same water in a prudent way as it flowed down its channel. In *Tyler v. Wilkinson* this question was also examined by Justice Story: 4 Mason, 401, 402. If a thing be common, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. The same doctrine is recognized in New Hampshire, 5 N. H. 231, and in the latest English authorities.

Those authorities are full to the point, that the fact that Hoy erected his mill before Sterrett, does not of itself confer a right of action, unless the occupancy has been accompanied by a possession for such a length of time as that the jury are bound to presume a grant. On this part of the case, the court was requested to charge the jury, that if the jury believe that Hoy, and those under whom he claims, have occupied and used the water for near forty years, the jury may, and are bound by law to presume there was a grant from the owners of the tract of land above and adjoining for using it, and the plaintiff would be entitled to recover. To this the court answer: We can see nothing in this case for a presumption such as the plaintiff requires. There was no use of any part of the land held by Sterrett for the use of Hoy's mill; no overflowing of land claimed by the defendant. This court can not apply this proposition to the case before them so as to answer it in the affirmative. The opinion of the court evidently is, that even admitting the fact that Hoy had been in the uninterrupted enjoyment of the water

right as at present exercised for more than forty years, yet, inasmuch as he did not overflow the lands of Sterrett or make any use of his premises, a presumption of grant can not arise. The learned judge seems to have adopted the opinion of Justice Gould in *Ingraham v. Hutchinson*, 2 Conn. 592. The reasoning of Justice Gould is very forcible, but did not accord with the opinion of his brother, who ruled the point otherwise; and this, it must be confessed, is in accordance with adjudged cases. The general rule of law is, that independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration; but an adverse right may exist in another, founded on his occupation. And although the stream be either diminished in quantity, or even corrupted in quality, as by the means of the exercise of certain trades, yet if the occupation of the party so taking and using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right. Twenty-one years' exclusive enjoyment of water, affords a conclusive presumption of right in the party enjoying it.

This principle of presumption is introduced in analogy to the act of limitations; and to raise the presumption of a grant, the enjoyment must have been adverse; or, as in *Carter v. Smith*, 9 Serg. & R. 20,<sup>1</sup> there must be a continued, exclusive enjoyment of the easement, with the knowledge and acquiescence of the owner of the inheritance, for twenty-one years, which would be evidence from which a jury might presume a right by grant or otherwise to such easement. Hoy built his mill on his own land, and swelled the water on his own land. Sterrett had no reason to complain of Hoy, nor was there a time when he had a right of action against him. Nor can he, with any propriety, be said to have acquiesced in the enjoyment of the water by Hoy. He can not be said to have granted a right, about which it would have been an impertinent interference to utter a complaint. Hoy could not have been restrained by any legal process from the enjoyment of the right in the manner he had been accustomed. How can Sterrett be presumed to grant that which Hoy had a right to do independent of his grant? There is nothing unreasonable in requiring Hoy, when he erected his mill, to erect it with a view to the capacity of the stream and the rights

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1. *Cooper v. Smith*, 9 Serg. & R. 22.

of his neighbors. And it must be presumed he has done so, as by prior occupation alone he acquires no right.

It is said the doctrine is necessary to promote peace, and it is admitted that the general principle of presumption is so; but it is also equally necessary to promote justice and fair dealing among neighbors. It amounts to this, that when the riparian owner above is unable, which is frequently the case, to improve and use the water on his own land, he must be deprived of a right incident to his land, and which may constitute its principal value. It would have been difficult for Sterrett to know the effect which Hoy's mill would have on his water right above. At any rate, Hoy was as competent to form an opinion on that point as Sterrett was, particularly as his attention must have been drawn to the matter when he erected his mill. As a prudent man, it was his especial duty to calculate the capacity of the stream with a view to his own and his neighbor's rights.

That a title to an incorporeal hereditament may be supported by an uninterrupted enjoyment for the period limited by statute for the right of entry upon land, was first laid down in England, in *Lewis v. Price*, 2 W. Saund. 175.<sup>1</sup> The rule was adopted in analogy to the statute of limitations. And in *Dongal v. Wilson*<sup>2</sup>, Chief Justice Wilmot, who ruled the case of *Lewis v. Price*, in answer to an objection that an ancient light did not exist more than sixty years, said: "If a man has been in possession of a house for sixty years, no one can stop up his lights. Possession," he said, "for such a length of time, amounts to a grant of liberty of making them, and is evidence of an agreement to permit them to be made."

The doctrine of the English books in respect to ancient lights, is not very well understood in this country. I am not aware that any case has been ruled in this state in which the principle has been recognized. It should be introduced with caution. Many vacant lots in our cities and towns are owned by persons who reside at a distance, and who are either unable or unwilling to improve them. It would be inconvenient to compel them to do so, on the penalty of forfeiting a valuable right by neglect.

The court were also further requested to instruct the jury, that if they believed that Sterrett frequently withheld the water in his saw-mill dam for two days and one night, to the injury of Hoy's mill, the plaintiff is entitled to recover. The court very properly refer this as a fact to be determined by the jury:

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1 2 W. Saund. 175 a, note.

2. *Dongal v. Wilson*, 3 W. Saund. 175 b, note.

and instruct them that if they believe the water was no longer detained than was necessary for a proper enjoyment of it, as it passed through Sterrett's land, for the use of his mill, it is a damage to which the plaintiff must submit. If the finding of the jury was wrong, the remedy was on a motion for a new trial. This question was decided by the jury, under the direction of the court, with a view to all the facts, the capacity of the stream, etc.; and however disposed we might be to interpose, had we the power, yet we can not afford relief under the circumstances of the case. The rights of the riparian owners must be adjusted in the same manner as if each mill had been erected at the same time; lapse of time not having given any superior right to either party. It is very true, as the court state, that if there was a vexatious detaining of the water, or if there was any degree of malevolence as to the time, or the quantity of water discharged by Sterrett, it was an injury for which the plaintiff was entitled to relief in damages. The jury having found that the defendant made a proper use of the water, we are of opinion that the judgment should be affirmed.

I have examined the other errors assigned, and do not discover that there is any error.

Judgment affirmed.

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Cited in *Miller v. Miller*, 9 Pa. St. 76; *Hartzell v. Sill*, 12 Id. 250; and *Whaler v. Ahl*, 29 Id. 101, upon the point that an upper mill owner is not answerable to one lower down the stream for detaining the water in his dam for several days, if this be necessary to the action of his mill, though the lower mill is thereby injured. Also relied upon in *Richart v. Scott*, 7 Watts, 462, and *Wheatley v. Baugh*, 25 Pa. St. 534, to sustain the doctrine that there can be no presumption of a grant or license where there is no adverse user. In *Warren v. Hunter*, 1 Phila. 415, it was held, "that the continuous occupation of a stream of water in a particular manner, by which the water may be diminished in quantity or rendered impure by the use made of it, if it has existed for the space of twenty-one years, affords the presumption of a grant, and is conclusive as to the right of the party so enjoying it," citing *Hoy v. Sterrett*.

**RIPARIAN PROPRIETORS, RIGHTS OF.**—The right to the flow of water over a person's lands is commensurate with his interest therein: *Ex parte Jennings*, 16 Am. Dec. 449; and such owner has the right to the uninterrupted flow of water in streams of water on his land, unless some adjacent proprietor has acquired an adverse right: *Coalter v. Hunter*, 15 Id. 726; but the right to divert such stream may be acquired by adverse enjoyment: *Id.* See, as to when a riparian owner is not liable to one below for use or diversion of part of the water: *Palmer v. Mulligan*, 2 Am. Dec. 270; *Platt v. Johnson*, 8 Id. 233. The acquiring of water privileges by use is discussed in the note to *Sherwood v. Burr*, 4 Id. 215.

**WATER, PROPERTY IN.**—*Gardner v. Newburgh*, 7 Id. 531; *Cooper v. Williams*, 22 Id. 745; *Blanchard v. Baker*, 23 Id. 504.



## MYERS v. HODGES.

[2 WATTS, 381.]

CONTRACT BY WHICH AN ADMINISTRATOR AGREES TO SELL certain real property belonging to the estate which he represents for a certain sum, and to make the title to the purchaser named therein, through the medium of the orphans' court, is against public policy, and can not be enforced.

ACTION brought by Lyman H. Hodges against William Myers and John F. Satterlee, the administrators of the estate of Harry Spaulding, deceased, for the breach of a contract by which the defendants agreed to sell plaintiff a farm belonging to Spaulding's estate. The contract, was that defendants were to obtain an order of sale from the orphans' court for such property, and when sold under such order, Hodges was to bid two thousand dollars, and if that was the highest bid, he was to have a deed. The order was obtained and a sale made, at which Hodges bid the amount agreed to be paid, and his bid being the highest bid, the farm was sold to him. On account of some informality in giving the notice of sale, the sale to Hodges was set aside by the court, and a new one had, at which Obadiah Spaulding bid twenty-two hundred and fifty-one dollars, and received a deed for the land. Verdict for plaintiff, Hodges, for three hundred and forty-eight dollars.

*Overton and Conyngham*, for the plaintiffs in error.

*Williston*, *contra*.

By Court, SERGEANT, J. Several points were presented to the court below, on behalf of the defendants, and error is assigned in the answers of the court. In none of them, however, does it appear that the court have erred, except in their answer to the first point; and we are of opinion that they ought to have directed the jury, that no action was maintainable on this contract.

An administrator has, by law, no interest in the real estate of the intestate. Where the personal estate is insufficient to pay the debts of the deceased, and to maintain and educate his children, the orphans' court, on the petition of the administrator, and his exhibiting an inventory, appraisement, and account of debts, may order the public sale of so much of the real estate as they may deem necessary for these purposes, and in that event the deed is to be made by the administrator, and the proceeds received by him. This is the whole authority vested by

law in the administrator; and it is plain that he is merely an officer designated by law for a special purpose, and clothed with a particular trust. He ought not, therefore, to be permitted to enter into a private contract that may interfere with the duties prescribed by law. If the obligations created by such contract are no more than those already imposed by law, the agreement is nugatory: if they differ, they may interfere with his lawful duties, and affect the interests of others for whom he is appointed to act. By the contract, in the present case, the administrators engage to sell for cash; fix the time of sale and of executing the deeds; and agree that Hodges, on bidding two thousand dollars, shall have a good title, if no other person bids beyond that sum. But the terms of sale, as well as the property necessary to be sold, and the necessity of selling it, are, by law, to be determined by the court, not by the administrator.

Unforeseen circumstances may occur to render a modification of these arrangements necessary and proper, or to show that the price agreed on is below the real value; and in such case the interests of the estate would require a course of conduct in collision with that stipulated by the contract. After a sale is ordered, it is certainly the right, if not the duty of the administrator, to procure bidders for the property, and obtain the highest price. But to do so after such a contract as the present, would be a violation of the contract, if the purchase was thereby defeated. It has been held, that if two persons agree not to bid against each other at auction, and that each should participate in a purchase by one, such agreement is void, as being against the policy of the law, which requires that public sales shall be fair and free: 6 Johns. 194; 8 Id. 444; 13 Id. 114. That principle applies to the present case: because, by virtue of the agreement between the plaintiff and defendants, it is, in effect, stipulated, that the administrators shall not, under any circumstances, endeavor to procure a higher price, however right and proper it would otherwise be to do so. A sheriff selling under a *venditioni exponas*, or a master in chancery under an order of court, would not be permitted to give an undue preference to one person, by suppressing exertions to procure the highest price, or inducing a peremptory sale at a fixed time. The law is jealous, when it intrusts an officer with the execution of a duty, that he shall be governed solely by his own regulations. Private contracts are properly applicable only to deal-

ings with a man's own rights, or acts done under a private authority.

The present case is a striking instance of the consequences resulting from such contracts. For one breach relied on was, that at the second sale the administrator procured a person to bid beyond the two thousand dollars, which, though a breach of the contract, was manifestly for the benefit of the creditors and children. So, it became apparent by the second sale, that, notwithstanding the obstacles arising from the events which had occurred, the property brought two hundred and fifty-one dollars more than the sum contracted for. This sum was, in all justice and equity, the right of the deceased's creditors and representatives, and not of the plaintiff; yet he seeks to recover it, under a pretense of damages, occasioned by non-performance of the agreement.

Judgment reversed, and a *venire facias de novo* awarded.

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Cited in *Miles v. Diven*, 6 Watts, 150, upon the point that an administrator can not contract for the sale of land belonging to the estate he represents, or in any respect control the course prescribed by law for its disposition. Also in *Bailey's appeal*, 32 Pa. St. 42; S. C., 2 Grant Cas. 228, to the effect, that the terms of sale, and the property of an estate necessary to be sold, must be determined by the court and not by the administrator. And in *Beeson v. Beeson*, 9 Pa. St. 283, that an executor in the sale of land belonging to the estate he represents, acts as the agent of the law, appointed for a special purpose, independently of the duties proper to the office of executor.

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## HARRINGTON v. McSHANE.

[2 WATTS, 443.]

**OWNER OF STEAMBOATS TRANSPORTING GOODS** on freight are common carriers, and are liable for all losses in the course of their employment as such, except those occasioned by the act of God or the public enemy.

**USAGE—COMMON CARRIERS.**—Where, by the usage of the place, goods shipped on freight are consigned to the master of a steamboat, who is also part owner, for sales and returns, the owners are liable, as common carriers, for the payment of the proceeds to the shippers.

**ACTION** brought by McShane, against Harrington and others, to recover the proceeds of certain flour. The facts are stated in the opinion. McShane had judgment.

*Fellerman*, for the plaintiffs in error.

*Metcalf and Burke*, contra.

*Biddle*, in reply.

By Court, SERGEANT, J. It appears by the evidence that it is the usage on the western waters, for steamboat owners, in addition to the business of carrying goods, to act as factors, to make sales and returns, without being paid any other consideration than the freight; and that the defendants, by their agent Hyatt, who was also part owner in the boat, received the plaintiffs' flour to transport to Louisville, and sell, in consideration of being paid a certain freight per barrel. The flour was taken there and sold, and the money which it produced was in the boat on its return up the river, separated from other moneys, and was destroyed by a fire which consumed the boat and its contents. This fire was the result of accident, without any neglect of the defendants, or the master and crew, the latter having used every possible exertion to rescue the money from the flames.

The owners of steamboats transporting goods on freight are common carriers, and are liable for all losses in the course of their employment as such, except those occasioned by the act of God or the public enemy. This rule of the common law on the subject of carriers was adopted on grounds of public policy, to prevent, on the part of those undertaking a public duty, secret frauds, out of the power of the proprietors of the goods to detect or establish by proof. No reason exists why the rule should be relaxed. In relation to a factor or consignee, there is a different principle: he is responsible only for negligence. The question of the defendants' responsibility in the present case depends on the character in which they held this money when the loss occurred. If they were merely factors, they are not responsible: if they were carriers, the reverse must be the case. Had the flour been lost on the descending voyage, by a similar accident, there could be no doubt whatever of the defendants' liability: they were certainly transporting it in the character of carriers. On their arrival at the port of destination, and landing the flour there, this character ceased, and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys in the defendants' hands and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier reattached. The return of the proceeds by the same vessel is within the scope of the receipt and of the usage of trade as proved, and the freight paid may be deemed to have been fixed with a view to the whole course of the trade, embracing a reward for all the duties of transportation, sale, and return. If the defendants,

instead of bringing the money home in their own vessel, had sent it on freight by another, there would have been to the plaintiffs the responsibility of a carrier, and there ought not be less if they chose to bring it themselves. If they had mixed the money up with their own, they would have no excuse for non-payment. The defendants can be relieved from responsibility only by holding that the character of carrier never existed between these parties at all, or that if it existed on the descending voyage, it ceased at its termination, and that of factor began and continued during the ascending voyage. But if the defendants bring back, in the same vessel, other property, the proceeds of the shipment, whether specific money or goods, they do so as carriers, and not merely as factors: See Story on Bailm. 350. In the cases of *Kemp v. Coughtry*, 11 Johns. 107, and *Emery v. Hersey*, 4 Greenl. 407 [16 Am. Dec. 268], the points involved in the present case were discussed, and received the same determination.

Judgment affirmed.

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Cited in *Verner v. Switzer*, 32 Pa. St. 212.

In *Emery v. Hersey*, 16 Am. Dec. 268, it was held, that where, by the usage of the place, goods shipped on freight are consigned to the master for sales and returns, the owners of the vessel are liable for the payment of the proceeds to the shippers. See generally as to the owner's liability on contracts of master: *Thompson v. Snow*, Id. 263, and *Ward v. Green*, Id. 437, note 440.

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## VICARY v. MOORE.

[2 WATTS, 451.]

**COVENANT LIES ON A SPECIALTY** exclusively, and not on a specialty modified or enlarged by simple contract.

**MODIFYING OR ALTERING** a written contract by parol makes a new agreement, which is entirely parol.

**PLEA PUIS DABREIN CONTINUANCE** should show the date of the last continuance, and that the matter sought to be pleaded arose since that time. Averring that the matter arose since issue joined is insufficient.

**ENTRIES MADE IN A BOOK OF ORIGINAL ENTRIES** from memoranda made on loose scraps of paper at the time the transactions occurred, and which have been carried in the pocket for several days, are not evidence to charge a party.

**WHERE A PARTY, WHO IS INDEBTED** to another upon two different accounts, pays an order drawn on him by such other, he may appropriate the amount so paid as a payment upon either account.

**JURY MAY CERTIFY A BALANCE IN FAVOR** of the defendant in an action of covenant.

**COVENANT** by John Moore against William Vicary. The declaration averred that by an agreement in writing, dated March 3, 1826, the plaintiff agreed to erect a stone dwelling for defendant according to certain plans therein stated. That subsequently, on April 1, 1826, they modified such agreement by parol, and made a number of changes therein. That plaintiff performed such agreement as modified and altered by the subsequent parol agreement, and that defendant had failed to pay as agreed. The court gave judgment for Moore. The other facts are stated in the opinion.

*Shannon and Banks*, for the plaintiff in error.

*H. M. Watts and Forward*, contra.

By Court, GIBSON, C. J. An action of covenant lies on a specialty exclusively, and not on a specialty modified or enlarged by simple contract. To the universality of this rule, *Jordan v. Cooper*<sup>1</sup> is an undoubted exception; but the supposition that it has driven the rule from our courts is an erroneous one. There it was determined, that the acceptance of a deed after the appointed day of delivery might be pleaded as equivalent to performance at the day, to entitle the vendor to a specific execution of the contract; but the remedy was not viewed, as to anything but the form of it, in the right of an action of law, or as anything else than a substitute for a bill in equity. From what fell from the chief justice and myself, it may be supposed that we took the plaintiff to be without remedy at law, and in fact, the matter was considered in that aspect; but it is certain, that although he had no legal remedy on the writing, he might have maintained assumpsit on the contract as modified by the acceptance, in which the specialty would have been admissible as inducement to show what parts of the original contract were incorporated with the new one. Such is the principle of *Baird v. Blaignrove*, 1 Wash. Va. 170; *Jewel v. Schoepel*,<sup>2</sup> 4 Cow. 564; and perhaps *Mudd v. Mudd*, 3 Har. & J. 438, which seem to be founded on *Heard v. Wadham*, 1 East, 619, and other modern English cases which are not authority here: See 2 T. R. 479; 3 Id. 490; and 1 Mau. & S. 575. In these it has been determined that where the stipulations in a deed are incorporated in a parol contract with matters unconnected with the deed, assumpsit lies for a breach of it as an entire thing. But it is obvious that this remedy is an inefficient one, and absolutely worthless after a lapse of six years; consequently its

1. 3 Serg. & R. 579.

2. *Jewell v. Schreppel*.

existence at law furnishes no objection to a specific execution in equity, to enforce which was the object in *Jordan v. Cooper*. That covenant is not maintainable on a heterogeneous agreement as a common law remedy, is most undoubted; and for the reason that a contract can not rest partly in writing and partly in parol: for as the alteration of a contract makes it a different contract, just as the altering of an instrument is laid in an indictment of forgery as the making of a new and entire instrument, which it is in effect; so the altering of a written contract by parol makes it all parol. And it is certainly more reasonable that the parol part, being the more recent expression of the intention, should draw to its nature the retained stipulations of the old contract, than that the latter should draw to them the parol stipulations, which are incapable of assimilation to a specialty. The matter for consideration, therefore, is whether necessity requires the principle of *Jordan v. Cooper* to be carried further than the case there decided, in which there was no modification of the covenants on which the defendant was called to respond. Now, there is a substantial difference between an alteration of the plaintiff's stipulations, being but conditions precedent to the action, and those of the defendant, on which it is directly founded. The performance of the first may be waived before the day, so as to entitle the plaintiff, without more, to an action on the defendant's covenants; and it is but a step further to sustain it on a waiver, after the day, in order to satisfy the requirements of justice by a specific execution. But to sustain a count based specifically on covenants modified by parol, would require us to give to the whole the quality and effect of a specialty. The parts superadded would be exempt from the statute of limitations; and the money secured by them would come in for a preference before the simple contract debts of a decedent. It is certainly less incongruous to reduce the whole to parol; the written contract being treated as abandoned, or used no further than to mark the terms and extent of the new stipulations.

In cases like the present, it may be doubtful whether there has been an alteration or an addition. Where the work contracted for may be executed at the same time conformably to the terms of both agreements, it may be taken that they are distinct, and competent to sustain separate actions, according to the quality and degree of each; but where they can not so stand together, it may be taken that the original contract has been relinquished, so much of it as consists with the subsequent

one being merged in it, and taking its character and qualities. This unity of contract by incorporation and assimilation is not peculiar to an alteration by parol. The alteration of a parol contract by a specialty would have the same absorbing effect as would the alteration of a specialty by a specialty, both writings constituting but one instrument. In the case before us there would seem to be both alterations and additions, which, however, equally indicate a relinquishment of the original bargain, and reduce the whole to the same grade. What may be the proper form to reach the merits in the circumstances of this particular case it is not for us, at present, to say; but it is clear that an action of covenant can not be maintained on a contract compounded of specialty and parol. The decision in *Phillips v. Rose*, 8 Johns. 306,<sup>1</sup> is express to the point. There were other matters in the cause; and first the rejection of the plea in abatement. The 4 Anne, c. 16, requires that no dilatory plea be received, "unless the party offering such a plea do, by affidavit, prove the truth thereof, or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true." Under this statute the affidavit has been dispensed with where the court could ascertain the fact by inspection of its own records. It would therefore seem that the record of the foreign attachment pleaded, being in the same court, may have been sufficiently verified by the record itself. Yet it is certainly the usual, and the better practice in such cases, to subjoin the affidavit. But there is a decisive objection to the plea on the face of it. It was intended to be *puis darrein continuance*, which requires extreme certainty; but instead of being pleaded as having arisen since the last continuance, with a precise specification of the day of the continuance, the matter is barely alleged to have arisen since the issue was joined. This is a gross defect which justified the rejection of the plea on motion.

The defendant offered in evidence certain entries in his books, not made at the time, but copied from loose slips of paper carried in the pocket for one or more days before they were transferred to the books. In *Curwen v. Crawford*,<sup>2</sup> it was said the entries must be made at or near the time, and if the latter, they ought certainly to be made in the regular routine of the business. In *Ingraham v. Bockius* [11 Am. Dec. 730], they were made the same evening, or the next morning, from memoranda kept by the servant who delivered the articles; and in *Patton v.*

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1. 8 Johns. 392.

2. 4 Serg. &amp; R. 5.



*Ryan*, 4 Rawle, 410, they were copied from a card the same evening or the next day. In the case at bar, neither the routine of the defendant's business, nor any other reason for postponement accounts for the delay. It is clear, therefore, that entries on loose scraps of paper, carried in the pocket for several days, without a reason or circumstance to account for the irregularity, could not affect the party charged. But the payment to the plaintiff's order in favor of one of his journeymen, was a defense to the extent of it. What matters it that a part of the work for which the order was drawn was no part of the job for which the action was brought? Or what if the job had not been done for the defendant at all? The plaintiff received so much money, which the defendant might have appropriated to either account at his pleasure; and having omitted to appropriate it then, he might do so when called upon. The point was erroneously put to the jury. The direction that a balance in favor of the defendant could not be certified in this form of action, was also erroneous. In *Gogel v. Jacoby*, 5 Serg. & R. 117 [9 Am. Dec. 339], it was held that the damages for malfeasance in the execution of a contract can not be set off in an action on it, in order to procure such a certificate. But here the attempt is to charge the plaintiff, not on that ground, but with an over-payment, which might, if established, be recovered back in an action of *indebitatus assumpsit*; and it is not so much the form of the action as the nature of the cross-demand which determines the power of the jury to certify. The direction on this part of the case also ought to have been in favor of the defendant.

Judgment reversed.

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Cited upon the following points: that a sealed agreement, altered by a subsequent parol agreement, will not sustain an action of covenant, but that the two together become a parol agreement, on which the action should be assumpsit: *Green v. Roberts*, 5 Whart. 88; *Vaughn v. Ferris*, 2 W. & S. 51; *Spangler v. Springer*, 22 Pa. St. 459; *Lawall v. Rader*, 24 Id. 285; *Irwin v. Shultz*, 46 Id. 76; *Carrier v. Dilworth*, 59 Id. 410; *McManus v. Cassidy*, 66 Id. 263; *Lawall v. Rader*, 2 Grant Cas. 429. That entries transferred from scraps of paper carried about in the pocket during one or more days are not evidence to charge a party: *Forsythe v. Norcross*, 5 Watts, 433. That where a parol agreement does not modify or change a written agreement, but both may be executed together, the former is not to be considered a substitute for the latter: *Ellmaker v. F. F. Ins. Co.*, 6 Id. 443. In *Lehigh C. & N. Co. v. Harlan*, 27 Pa. St. 441, the principal case was thus referred to: "The distinction is taken in *Vicary v. Moore*, 2 Watts, 457, and followed in other cases, between an alteration of the plaintiff's stipulations, being but conditions precedent to the action, and those of the defendant, on which it is directly founded. The performance of the first may be waived, so as to enti-

tle the plaintiff, without more, to an action on the defendant's covenants; but to sustain a count based specifically on covenants, modified by parol, would require us to give to the whole the quality and effect of a specialty."

BOOKS OF ACCOUNT AS EVIDENCE.—See note to *Rhoads v. Gaul*, *ante*, 277, and cases there cited.

## KLINGENSMITH v. BEAN

[2 WATTS, 486.]

CONFIRMATION BY THE ORPHANS' COURT of a sale of land by an administrator, made subsequent to the time to which the order directing the sale was made returnable, is tantamount to the continuance of such order to the time that the sale was actually made, and such sale can not be collaterally attacked as void.

DECREES OF THE ORPHANS' COURT stand upon the same footing as judgments of a court of common law, and can not be examined collaterally in an action of ejectment.

EJECTMENT brought by Bean and others, as heirs of Robert Bean, deceased, against Klingensmith to recover a tract of land. The latter claimed by purchase from the administrator of said deceased. An order of sale was made by the orphans' court in January, 1818, directing the administrator to sell the *locus in quo* on the Monday of the next May court. There was no sale on the day appointed, nor continuance nor renewal of the order of sale. In November, 1818, the administrator returned that he exposed the land for sale at the May term as directed, and there being no bidders, he adjourned the sale to August 18, 1818, when the land was sold to William Scott and prayed that such sale be confirmed, and for leave to make a deed. February 16, 1819, the court confirmed the sale, and granted the leave prayed for.

*Holstein and Purviance*, for the plaintiff in error.

*Banks and Pearson*, for the defendants in error.

By Court, ROGERS, J. It is the usual practice of the orphans' court to appoint the day of sale, and to make the proceedings of the administrator returnable to the next orphans' court. In such cases the administrator begins the sale on the day appointed, and in his discretion adjourns the sale to a day certain. If a term intervenes, it is the practice to apply to the court for a continuance of the order. But although this is the usual practice, it is not universal. There is nothing in the act of 1794 which directs this mode, nor is there anything which prevents the court, for reasons of which they are the competent

judges, to adopt a different course. The order is not a returnable writ, and in *Rham v. North*, 2 Yeates, 118, the court say that the words of the law appear to be directory only, and they can see no good reason why a regular fair sale may not be returned at another court. The court not only have the power, but justice to the creditors and heirs sometimes requires this course to be pursued, as in the present instance, where the petition was presented in January, and where it was plainly the interest of all parties that the sale should be deferred until the ensuing spring, when purchasers would be able to view the premises, and judge of the quality of the soil. In *Rham v. North*, it is said that under an order of the orphans' court empowering an administrator to sell lands, he should begin the sale on the day affixed by the court, and may afterwards adjourn it, but not beyond the day of the succeeding court. I do not see any good reason for the restriction, and I am inclined to believe that the practice has been otherwise, although it has been usual to sanction the proceedings of the administrator by an application to the court, in which the facts are stated for a continuance of the order. The orphans' court have always exercised a superintending power over such proceedings, and as long as this is faithfully done, I can not see the danger of abuse by a liberal extension of time to the administrator to effect a sale. Although here the order was not continued, yet the facts were truly represented by the administrator to the court in the return, and have been sanctioned by them. A subsequent recognition of the act of the administrator is tantamount to a continuance of the order, and equally available to protect the interest of parties. There was no surprise, no misrepresentation, no fraud. All that the act of 1794 requires is, that the administrator who makes the sale shall bring his proceedings to the next orphans' court after the sale is made, and in this respect the directions of the act were literally pursued. If, then, this case were before us on an appeal, it might be questionable whether it would not be our duty to affirm the sale, as it appears to have been a fair regular sale for full value. But however this might be, yet it is plain that the proceedings were but irregular and not void, and this brings me to the second question.

The cases of *Messinger v. Kintner*, 4 Binn. 97, and the *Lessee of Snyder v. Snyder*, 6 Id. 498 [6 Am. Dec. 493], have given rise to an opinion that the decree of the orphans' court may be examined collaterally in an action of ejectment. But although these cases, if attentively examined, do not establish the doctrine, yet

this point is put beyond all doubt by subsequent decisions. A decree of an orphans' court is placed on the same footing as a judgment of a court of common law; for this principle I refer generally to *McPherson v. Cunliff*, 11 Serg. & R. 433 [14 Am. Dec. 642]; *The Orphans' Court v. Groff*, 14 Id. 182; *Blount v. Darrach*, decided by Judge Washington, and reported in 4 Wash. C. C. 657, and *App's Executors v. Dreisbach*, 2 Rawle, 287 [21 Am. Dec. 447]. A judgment of a court of competent jurisdiction directly upon the point, is conclusive between the same parties or their privies, upon the same matter coming directly in question in another court of concurrent jurisdiction; and this rule is founded upon considerations as well of abstract justice as of public policy. The court of common pleas assimilate this to the case of a sale of a sheriff without a *venditioni exponas*, which is void; but I should think it should rather be likened to a decree of a court of chancery, and this in fact it was in *McPherson v. Cunliff* [14 Am. Dec. 642], before cited. It is well settled, as regards that court, that you can not go behind the decree to examine the regularity of the proceedings; and this, whether the irregularity appears on the face of the proceedings or not. The injustice of this case is most manifest. The property was sold for a full price, which went to the payment of the debts of the intestate. The sale received the sanction of a court of competent jurisdiction, whose peculiar duty it is to protect the interest of minors. The heirs of the intestate now seek to recover the property from the purchaser, without payment of the purchase money, or a reimbursement of money expended in improvements.

Judgment reversed.

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Cited with approval in *Sankey's appeal*, 55 Pa. St. 496, and *Mueselman's appeal*, 65 Id. 488.

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## BELTZHOOVER v. BLACKSTOCK.

[3 WATTS, 20.]

NOTICE—PUBLICATION IN A NEWSPAPER OF EQUITIES existing in favor of the maker or indorser of a promissory note, will not affect a purchaser for value without notice of such equities, although he may be a regular subscriber of such paper.

WHERE NEGOTIABLE PAPER HAS BEEN LOST OR STOLEN, or obtained by duress, or put in circulation by fraud, upon proof of these circumstances it is incumbent upon the plaintiff to show that he purchased such paper *bona fide*, and for a valuable consideration.

A PERSON TO WHOM A PROMISSORY NOTE has been transferred, and who claims to be a *bona fide* purchaser for value, can not be called upon in an action upon the note to show the consideration that he paid for it, unless express notice is given to him prior to the trial that he will be compelled to do so.

AN ATTORNEY WILL NOT BE PERMITTED to divulge knowledge obtained in the course of his professional intercourse with his client.

COMMUNICATIONS FROM A CLIENT to his attorney to be privileged, do not require to be made while a cause is depending in court; it is sufficient if the attorney was consulted professionally, and acted or advised as counsel.

ACTION brought by William Blackstock and George Blackstock, as partners, against Jacob Beltzhoover, upon two promissory notes drawn by Henry Holdship & Son, in favor of, and indorsed by Beltzhoover or order, and delivered by the makers to Thomas Hind, who transferred them to plaintiffs. Verdict and judgment for plaintiffs. The facts necessary to an understanding of the case are sufficiently referred to in the opinion of the court.

*Fellerman and Forward*, for the plaintiffs in error.

*Colwell*, for the defendants in error.

By Court, SERGEANT, J. The defense set up on the trial would be clearly admissible in a suit by Hind, but this being a suit of another holder, to whom Hind passed the notes, something more must be shown by the defendants before they can affect the plaintiffs by the want of consideration between the original parties: and the question is, whether sufficient was shown to justify the admission of the evidence offered.

The defendants have undertaken to place the plaintiffs in the situation of Hind by proof of a knowledge on their part of the objections to these notes, and also of the circumstances casting a suspicion on the plaintiffs' title. And I concur in the position, that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defense: *Gill v. Cubit*, 3 Barn. & Cress. 466, 3 Kent Com. 53. Much more, if there is ground to suspect a secret understanding that the indorsee should appear in the light of an innocent holder, whilst really acting as an agent or trustee for the original party. But what are the circumstances in evidence here that lead to this conclusion? I perceive nothing in the contract of plaintiffs and Hind in relation to the banks in which the notes were placed, or their removal from one and deposit in another,

that is out of the usual course of business. Before a note is due, the holder may withdraw it from the bank in which he has deposited it for collection, and transfer it to a person who may deposit it in another bank in which he transacts business, without inducing a suspicion of impropriety.

The publication in the Gazette, with the evidence of one of the plaintiffs being a subscriber, that his paper was duly sent, and no complaint made of omission, is relied on as visiting the plaintiffs with notice of the defense which the defendants intended to make. But such a publication can not be considered as affecting the plaintiffs with direct notice of the contents of the advertisement, nor even as a circumstance for the jury to infer it. It would be of dangerous consequence to hold an advertisement in the Gazette to be such an actual notice as to visit a party with all the consequences of full and express notice. A general warning or notice in the Gazette, not to trust a wife, is not a sufficient prohibition to excuse the husband from liability for necessities, though an actual notice would be: 1 Bac. Abr. 488. Notice in the newspaper of dissolution of partnership, is not sufficient as to persons who had previously dealt with the firm: 4 Id. 608. In the present instance, the newspaper may not have been delivered to the party: if left at his abode, he may not have read it, or not till subsequently to the transaction it related to. It would be hard to subject a man to the consequences of *mala fides*, when perhaps he never had knowledge of the matter alleged. In the case of a common carrier, a notice limiting his responsibility was held not sufficiently given, though constantly published in a weekly newspaper which the party had taken for three years: ——— v. *Horne*, 3 Bing. 12,<sup>1</sup> cited 3 Kent Com. 39. It would not be intended, say the court, that a party read all the contents of any newspaper he might choose to take. I therefore think the publication in the newspaper did not amount to notice to the plaintiffs of the objections to the notes so as to place them in the situation of Hind, and subject them to the equities he was liable to.

But it is contended that, independent of all proof on the subject, the defendants had a right to give evidence of mistake and fraud in the procurement of these notes by Hind, and that the plaintiffs were then bound to show the circumstances under which they got the notes, before they could be deemed *bona fide* holders for a valuable consideration, exempt from the defense set up. And the rule undoubtedly is, that when negotia-

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1. *Rowley v. Horne*, 3 Bing. 2.

ble paper has been stolen or lost, or obtained by duress, or procured or put in circulation by fraud, proof of these circumstances may be given against any plaintiff, and on such proof being given, it is incumbent on the plaintiff to show himself to be a holder *bona fide*, and for a valuable consideration: otherwise he is considered as standing in no better situation than the former holder, in whose hands the instrument received the taint. This I take to be the rule as settled here and in England. In *Holme v. Karsper*, 5 Binn. 469, the suit was by the indorsee against the makers; and the late Chief Justice Tilghman says: "In the first instance it is presumed every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion, before the plaintiff is expected to do anything more than produce the note on which he founds his action. The defendant offered to prove that the note indorsed by him had been put in circulation by the drawer by fraud and falsehood. If he had proved this, enough would have been done to throw on the plaintiff the proof of the manner in which he came to the possession of the note, and what he paid for it." In *Heath v. Sansom*, 2 Barn. & Ald. 291; 22 Eng. Com. L. 80,<sup>1</sup> it is said that it may be laid down as a general rule, that if the note or acceptance were taken under such circumstances, the indorser himself could not recover: the indorsee must prove that he became so for a good consideration. This general rule appears not to be inconsistent with justice and sound policy. It is calculated to check secret transfers, by covin and collusion, to a *male fide* holder, for the purpose of throwing on a party to a note or bill a responsibility which is unjust, and which, if the truth appeared, he could not be subjected to. Nor does it seem to impose any undue hardship on the plaintiff, to oblige him to show that consideration which is the foundation of the privilege he enjoys beyond the person from whom he derives title.

Without meaning to lay down any general rule, it is sufficient to say, that to throw on the plaintiffs the necessity of showing the consideration they gave for the note, justice requires that express notice should be previously given that they would be called upon at the trial to do so; otherwise they may be taken by surprise, and inferences drawn against them upon their inability to give proof which would have been in their power if apprised beforehand. Being a negotiable instrument, the first presumption is, that the holder took it fairly and in the regular course of business: and when that presumption is to be over-

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1. 2 Barn. & Adol. 291; 22 Eng. C. L. 128

thrown, and he is to supply it by actual proof, he ought to have opportunity to prepare for doing so. On this point the practice of the English courts seems to differ: the common pleas holding notice indispensable; the king's bench not requiring it: *Mana v. Lent*, 1 Moo. & M. 240; 22 Eng. Com. L. R. 302,<sup>1</sup> Chit. on Bills, 400. I know of no decision in our own courts; but I believe the practice has been to give notice. It was done in *Holme v. Karsper*, 5 Binn. 471, and it would seem right that the practice should be continued.

In the present case the defendant gave a notice to the plaintiffs that no valuable consideration passed from Hind to the maker, as to a part of these notes, but did not notify them of his intention to call on them at the trial to show their title from Hind. The defendants, therefore, not having availed themselves of this ground by previous notice, it was too late to do it on the trial. The evidence of fraud or mistake, as between the original parties, was nugatory and inadmissible in this suit.

As to the other point, the refusal to compel Mr. McDonald to answer the questions proposed to him by the defendant, it seems that he possessed no knowledge on the subject except what he obtained from his professional intercourse with the parties. This it is the privilege of the client he should not be permitted to divulge. Without such a privilege the confidence between client and advocate, so essential to the administration of justice, would be at an end. It is not necessary there should be a cause depending in court; it is sufficient if the witness were consulted professionally, and acted or advised as counsel. No knowledge appears to have been acquired by him from being called as a witness to any transaction, or acting collaterally in a distinct concern; nor was he asked for information derived *aliunde*. The facts alleged by the defendant ought therefore to have been established by other testimony. There was no error in overruling this evidence.

Judgment affirmed.

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Cited upon the following points: That it is not essential to the protection of professional communications that a judicial proceeding should be actually pending, or even contemplated: *Moore v. Bray*, 10 Pa. St. 524. That in an action upon a promissory note where the defense is that it was fraudulently made and put in circulation, the plaintiff can not be compelled to prove that he is a *bona fide* holder, and to show the consideration that he paid for it, unless he is notified before the trial that such proof will be required: *Simmons v. West*, 2 Miles, 198; *Albietz v. Mellon*, 37 Pa. St. 370; *Porter v. Gunnison*, 2 Grant Cas. 297, 300; *Maples v. Browne*, 48 Pa. St. 462; *Kuhns v. G. N. Bank*,

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<sup>1</sup> *Mana v. Lent*, 22 Eng. Com. L. 516.



68 Id. 448. That when such notice has been given, very slight circumstances are sufficient to throw the burden of proof upon the plaintiff to show that he is a *bona fide* purchaser, in the ordinary course of business, of the note sued on: *Porter v. Gunnison*, 2 Grant Cas. 300; and that it is sufficient for the defendant to show that the note was lost or stolen, or put in circulation fraudulently, to make it incumbent upon the plaintiff to prove that he is a purchaser for value: *Knight v. Pugh*, 4 W. & S. 448; *Maples v. Browne*, 48 Pa. St. 462; *Kuhns v. G. N. Bank*, 68 Id. 448. That mere evidence of the want of consideration between the maker and the payee will not be sufficient to put the holder upon the proof of his title to the note: *Hutchinson v. Boggs*, 28 Id. 296. In *Phelan v. Moss*, 67 Id. 65, that portion of the principal case in which it was said, "that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defense," was held to be unnecessary to the decision of the principal case, and not law.

ATTORNEY AT LAW will not be permitted to reveal confidential communications: *Parker v. Carter*, 6 Am. Dec. 513; not even after the suit has terminated: *Chase's case*, 17 Id. 277. This privilege, however, does not extend to the withholding of facts he might have known without being attorney: *Stoney v. McNeil*, 18 Id. 666. See further as to the privilege attaching to communications between attorney and client: *Hatton v. Robinson*, 25 Id. 415, and cases cited in the note thereto.

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## LODGE v. PATTERSON.

[8 WATTS, 74.]

A PERSON IN WHOM AN OUTSTANDING TITLE to the land in controversy is alleged to exist is not a competent witness for the defendant in an action of ejectment.

POSSESSION OF ONE JOINT TENANT or tenant in common is *prima facie* the possession of his co-tenant, and such possession can never be considered as adverse, unless attended with circumstances demonstrative of an adverse intent.

ACTUAL NOTICE IS NOT NECESSARY, however, before the possession of one joint tenant or tenant in common can be considered as adverse to his co-tenant. Circumstances from which such co-tenant can infer that it is adverse will be sufficient.

EJECTMENT brought by the heirs of N. Patterson, deceased, against Lodge and Lodge, who claimed from the heirs of John Patterson, deceased. John and Nathan Patterson settled on a tract of land, of which the land in dispute was a part, the former occupying the south end of the tract and the latter the north end. The south end was called John's and the north end Nathan's, and was occupied by them until the former's death in February, 1803, when the latter put up the portion called John's at public auction and purchased it himself, and went into possession of the whole tract, paid the taxes on it, had it

surveyed in his own name, and occupied it ever since, claiming it as his own. The other facts are stated in the opinion. Verdict and judgment for plaintiffs.

*Pearson*, for the plaintiffs in error.

By Court, SERGEANT, J. In this ejectment the defendants, Lodge and Lodge, entered on the record the plea of not guilty; and moreover, that they took defense for four undivided seventh parts of two hundred acres, being the shares of Andrew Patterson and three others, heirs of John Patterson, deceased, who owned and died seised thereof. They offered Nathan Patterson, a son of Andrew Patterson, as a witness in their behalf. The defendants having set up the title of John Patterson's heirs, by way of defense against the plaintiff's claim, the question trying in this ejectment was, whether the right of the plaintiffs, who are the heirs of Nathan Patterson, or of the heirs of John Patterson, was the better. The witness, therefore, came forward to maintain his own title, and to keep those in possession who recognized it. If the defendants succeeded, the witness' title was found by the verdict, and he could call on the defendants to attorn to him, or commence an action to recover possession. In such action the proceeding here would be evidence for the purpose of proving, that the defendants asserted the witness' title to be the best. The witness seems, therefore, to be directly interested in obtaining a verdict in favor of the defendants, by whom he is called, and was on that account properly rejected.

The other errors assigned are in the charge of the court respecting the statute of limitations. There are certain principles on this subject which have been well established by authority, and are consonant to justice and reason. The possession of a party to be available as a bar from lapse of time under the statute, must be adverse. The possession of one joint tenant or tenant in common, is *prima facie* the possession of his companion also: and it therefore follows that the possession of the one can never be considered as adverse to the title of the other, unless it be attended with circumstances demonstrative of an adverse intent; such as demand by the co-tenant of his moiety, and refusal to pay, saying he claims the whole: or, when one joint tenant bade the other go out of the house, and he went out accordingly: Adams on Eject. 56. On the same principle it was decided, that although the entry of one is, generally speaking, the entry of both, yet if he enter, claiming the whole

to himself, it will be adverse: *Id.*; 14 Vin. Abr. 512. The circumstances in the present case evincing an actual ouster were exceedingly strong. The plaintiff putting up the two hundred acres for sale and purchasing them was properly stated by the court below to be a circumstance entitled to weight: it was a claim of the whole to himself in his own right, as purchaser, and of course hostile to any right which he or the other relatives possessed as heirs of his brother. This claim was persisted in by entering on the land and leasing it as his own exclusively, by having a survey made in his own name; by taking the whole profits, and holding more than twenty-one years by a continued possession and enjoyment.

It is urged that the purchase by N. Patterson is not to be deemed a circumstance of weight, because it does not appear that the other heirs had notice of it. That, however, is not necessary to be shown as an ingredient to constitute adverse possession. The character of adverse possession is given, not by proving notice to persons interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. To constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved he had knowledge of the entry and ouster committed on his land. The open act of entry on the land, with the declared intent to disseise, constitute the disseisin. No act unexplained could be a stronger declaration of the intent of the party than his purchasing the whole right of his deceased brother in the land: and his possession can not be construed to have been in the character of co-tenant with his brother's heirs, when he had purchased all their right, and claimed to hold it.

For these reasons we think there is no error in the charge of the court.

Judgment affirmed.

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Cited in *Phillips v. Gregg*, 10 Watts, 164, that the possession of one tenant in common is *prima facie* the possession of his co-tenants, unless it be attended with circumstances demonstrative of an adverse intent. In *Forward v. Deetz*, 32 Pa. St. 73, that to establish an ouster by one co-heir against other heirs, there must be some plain, decisive, unequivocal act or conduct of the party claiming, amounting to an adverse and wrongful possession in himself, and a disseisin of his co-heirs. Also cited to the same point in *Hart v. Gregg*, 10 Watts, 190; *Watson v. Gregg*, *Id.* 296, and *Miller v. Miller*, 60 Pa. St. 22. In *Dikeman v. Parrish*, 6 *Id.* 227, it was held, upon the authority of the principal case, that to constitute a disseisin, it is not requisite that notice

should be sent to the disseisee, or that it must be proved he had knowledge of the entry and ouster committed on his land.

**OUSTER BY CO-TENANT, WHAT IS.**—In the note to *Gillaspie v. Osburn*, 13 Am. Dec. 140, this subject was considered at length, and also from what an ouster may be inferred. Actual ouster by a tenant in common may be presumed from his exclusive possession of the common property under a claim of title for forty years: *Jackson v. Whitbeck*, 16 Id. 454. See, also, *Thomas v. Garvan*, 25 Id. 708; *Den v. Webb*, Id. 711, and other cases cited in the notes thereto. Possession of one tenant in common is the possession of all, and the statute of limitations runs only against an adverse possession of the entire and undivided property from the time of the actual ouster and adverse holding: *Coleman v. Hutchenson*, 6 Id. 649.

## MCDOWELL v. SIMPSON.

[3 WATTS, 129.]

**AN AGENT IS A COMPETENT WITNESS** for his principal, except in cases where the principal is sued on account of the negligence of the agent.

**AN AGENT MAY BE A WITNESS** to prove his own authority.

**A LEASING OF LANDS** by a person unauthorized may be ratified by the owner accepting the rent as it becomes due.

**A LEASE OF LANDS** for a longer period than three years by an unauthorized agent, can only be ratified by the owner in writing.

**PAROL RATIFICATION OF SUCH A LEASE** would give to it no greater force or effect than if the owner had himself leased it by parol, which would be to create an estate at will, and if the tenant was permitted to hold it for a year or more, an estate from year to year, which could be terminated only by giving a three months' notice to quit.

**EJECTMENT** brought by McDowell. The facts are sufficiently stated in the opinion. Verdict and judgment for defendants.

*Dallas and Biddle*, for the plaintiff in error.

*W. H. Lowrie and Fetterman*, for the defendants in error.

By Court, **KENNEDY, J.** The first error assigned is founded on an exception to the admission of Mr. Brackenridge as a witness: first, because he has undertaken, as the agent of the plaintiff in error, who was also the plaintiff below, to give a lease of the land in question in this case to the defendants in error, under which they claimed a right to hold possession of it; and second, the matters of which he was to testify were not the subject of oral evidence, because the act of assembly against frauds and perjuries requires that they should appear in writing. His having undertaken to act in the character of an agent for the plaintiff is not sufficient to render him incompetent. The general rule on this subject seems to be in favor of the

competency of the agent as a witness, unless in cases where the principal is sued on account of the negligence of the agent. In such cases the agent can not be a witness for the principal, because in the event of a recovery against the principal, the agent becomes liable to indemnify his principal; and the judgment against the principal would be evidence against the agent in an action by the principal for indemnity. Hence, it is the interest of the agent to procure by his testimony, a judgment in favor of his principal, and therefore held incompetent. But the conduct of Mr. Brackenridge is not impeached in this case; nor was he called to testify in favor of the plaintiff, for whom he had undertaken to act as agent. I am unable to perceive that his interest lay more on the one side than on the other in this case; and therefore, it can not be considered that he was inadmissible on the ground of interest. Having then no interest in the result of the suit, why should he not be competent to establish by his own testimony his authority as an agent? He is not a party on the record to the suit, that he should be excluded for that reason. Nor can it be said that he does not know the fact as well as any other. Then, unless there be some principle of policy that renders him incompetent as a witness for this purpose, it seems impossible to imagine any other ground for his being so; and so far as sound policy is concerned in the question, I am unable to satisfy my mind that the interest of the community would be advanced in the least by declaring him incompetent.

Next, as to the objection growing out of the act against frauds and perjuries, which declares, that "all leases, etc., made or created, etc., by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the form and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding, except nevertheless all leases not exceeding the term of three years from the making thereof." Now, although from the terms of this act, the authority under which Mr. Brackenridge professed to act as the agent of the plaintiff, ought to have been in writing, so as to have given full effect to the lease according to its tenor; yet supposing he made it without either written or verbal authority, and that the plaintiff afterwards knowingly received the rents as

they became due, and were paid under it by the tenants, it might very properly be considered an implied assent, at least, by parol to the lease on his part, and give to it the force and effect of a lease at will; and if the tenants were suffered to hold under it for upwards of a year, paying the rent as it became due, and the plaintiff receiving it without objection, the lease, instead of continuing to be a lease strictly at will, would thereby become a lease from year to year, so that the tenants could only be put out of possession at the end of a year, upon having received three months' previous notice to quit: See *Riggs v. Bell*, 3 T. R. 371;<sup>1</sup> *Clayton v. Blakey*, 8 Id. 3; *Schuyler v. Leggett*, 2 Cow. 663; *People v. Rickert*, 8 Id. 226. These were all facts which could be proved by parol evidence, and whether they existed or not was a question which could only be decided by the jury after hearing the evidence. The testimony of Mr. Brackenridge tended in some degree to prove these facts, or at least some of them, and was therefore admissible.

The remaining errors insisted on in the argument, present but two questions: 1. Had Mr. Brackenridge any sufficient authority from the plaintiff in error to make a lease of the property in question for a term of seven years; and 2. If he had not, has Mr. McDowell, the plaintiff, ratified and confirmed the lease made for that term of time by Mr. Brackenridge.

As to the first of these questions, when Mr. Brackenridge made the lease for seven years, it is clear, from his own testimony, that he had no authority, not even the color of it, either verbal or written, from the plaintiff, to make a lease of the property in dispute for more than one year. We have seen from the act of assembly already recited that an authority to make a lease of real estate, for a term exceeding three years, must be in writing; and though Mr. Brackenridge had an authority in writing from the plaintiff to make a lease for one year, yet that was all, and his making it for seven years was as much an act on his part without authority, as if he had had no power to make one for any period of time whatever. Notwithstanding, however, this lease for seven years was made without authority, it was still in the power of the plaintiff to ratify and confirm it: and this brings us to the second question, Has he done so? It is not pretended that he ever did so by writing, and although he may have done it by parol without writing, yet it is obvious that such confirmation could give to the lease no greater force or effect than if he had made it himself originally by parol

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1. *Doe d. Riggs v. Bell*, 5 T. R. 471.

without writing; which would, according to the express terms of the act, have given it the force and effect of a lease at will, and nothing more. It is proper to observe that such leases are not declared void by the act, but that they "shall have the force and effect of leases or estates at will only." But what was formerly held and considered to be a lease at will is now deemed a lease, from year to year, when possession has been taken under it and held for upwards of a year, and the rent paid and received according to its terms. Hence a parol lease made by the owner of land without writing, or by his agent constituted without writing, for a term exceeding three years, and possession taken and held under it for more than a year, the tenant during that time paying and the landlord receiving the rents as they became due, would be construed afterwards a lease from year to year, and might be put an end to by either party at the end of any year upon giving three months' previous notice of his intention to do so; but at no other time could it be terminated, unless by the consent of both parties.

Although Mr. Brackenridge made a lease in writing, under his hand and seal, for a term of seven years, yet as it was made without any authority from the plaintiff, it was not binding on him; but if he afterwards received the rents knowingly which became due and were paid on it without objection, for upwards of a year, it may be considered as implying an assent on the part of the plaintiff, that the party paying the rent should hold the property mentioned in the written lease, on his paying the rent therein specified, as tenant from year to year. But even an express declaration on the part of the plaintiff, without writing, that he was satisfied with the written lease, would not have been sufficient to make it other as to him than a parol lease without writing, because this would not make it "a lease in writing, signed by the plaintiff or his agent, thereunto lawfully authorized by writing," which is what is required by the very words of the act against frauds. In no view then that can be taken of the written lease made by Mr. Brackenridge, and the subsequent consent of the plaintiff in respect to it, admitting all the evidence given on the trial to be true, can it be made such a lease of the plaintiff, for a term of seven years, as would be good under the act, or pass any other interest than an estate at will: or after the receipt of rent upon it for a sufficient length of time, may be turned into a lease from year to year.

Now although the court below in their charge to the jury were clearly of opinion that Mr. Brackenridge had no authority

whatever from the plaintiff to make such a lease as he did, and that the plaintiff had done nothing which could do more than make it equivalent, at most, to a parol lease by him without writing; yet they took up a notion that the jury, from the evidence, might consider it as taken out of the operation of the acts against frauds, because the defendants had done some work in repairing the pavement in front of the house, and had, by the terms of the lease, undertaken to pay a larger rent than had been paid under former leases of the same property, and accordingly instructed the jury, that "if the plaintiff, with a full knowledge of the fact that the property had been leased for seven years, had received the increased rent, or stood by and permitted improvements to be made having reference to the new lease, it would be inequitable to rescind the lease; and under such circumstances the defendants would not be affected by the statute."

It is not necessary in this case to decide whether under any, or what circumstances, a jury might, according to the rules and principles which have obtained in equity, enforce the specific execution of a parol lease, which, in its terms, comes within the provisions of the act against frauds; because the lease in question shows on its face that the making of improvements formed no part of the object, either in giving or accepting it. It is barely a demise of the property on the one side for a term of seven years, and a stipulation on the other to pay a certain rent per annum without any increase or diminution of it during the lease. The enjoyment of the property in time past, and not in time to come, under such a lease, forms the consideration for the payment of the rent as it becomes payable, so that at the end of each quarter or year, as the rent becomes payable, the tenant, having enjoyed up to that time, has received the full consideration for the quarter or year's rent which has become due, and he can under no pretense withhold the payment of it; not even, I take it, were it made manifest that he would be evicted the next day, before the expiration of the lease, under a better title than that of his lessor. But if he will make improvements not contemplated or authorized by the lease, he must be considered as doing them at his own risk, since he does not choose to consult his landlord in respect to them. He can not be permitted to improve his landlord out of his legal rights. In this case, however, all the improvements made appear to have been nothing more than what are ordinarily incident to tenancies from year to year. And as to the circumstance of the rent being greater



than any previously paid for the same property, it is what generally occurs in every city or town in an improving condition, where both the population and business of it are increasing rapidly, as was the case here. That the tenant may be induced to give a higher rent, in consideration of the extended term of the lease, is altogether probable, especially where it is believed that real estate is rising in value every year, but then this is so generally connected with the making of leases in all cases, that it can not be made the ground for taking this case out of the act, without in effect undertaking to repeal it. Besides, it is obvious from the tenor of the act itself, that the longer the term agreed on may be, the greater the necessity for having it reduced to writing and signed by the parties. It appears to me, therefore, that the court below erred in advising the jury that, under the circumstances given in evidence, they might consider the defendants as not affected by the statute.

Judgment reversed, and a *venire de novo* awarded.

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Cited in *Grayson v. Bannon*, 8 Watts, 528, and *Struthers v. Kendall*, 41 Pa. St. 229, to the effect that an agent is a competent witness for his principal, except where the principal is sued for the agent's negligence. In *Twitchell v. City*, 33 Id. 220, upon the point that to enable a vendor to enforce specific performance of a contract for the sale of lands, made by an agent of the alleged vendee, it is necessary that the agent's authority should be in writing.

UNAUTHORIZED EXECUTION OF WRITTEN INSTRUMENT, HOW RATIFIED.—In the note to *Jackson v. Murray*, 17 Am. Dec. 59, in considering the question whether a deed, which has been executed by a person pretending to act as the agent of another, but who acts without authority, may be ratified by parol, the rule was stated to be that such a deed may be so ratified, and that such ratification rendered it as valid and binding as if it had been executed by the principal in the first instance. Upon an examination of the authorities there cited, and from which that rule was deduced, it appears that most of them are cases in which one member of a copartnership, without being authorized so to do, has attempted to bind the firm by an instrument under seal. In those cases it was held that such an instrument may be ratified by the other members of the firm by parol, and that such ratification gives to it the same validity as though executed by the firm in the first instance; and this is the recognized rule of the modern authorities in this country, as far as it pertains to the ratification of sealed or written instruments executed by one partner without authority from his copartners, so as to make them binding upon the firm: *Story on Part.*, sec. 121, *et seq.*; *Smith v. Kerr*, 3 N. Y. 150; *Worrall v. Munn*, 5 Id. 240; *Pike v. Bacon*, 21 Me. 280; *Mackay v. Bloodgood*, 9 Johns. 285; *Skinner v. Dayton*, 19 Id. 513; *Gram v. Seton*, 1 Hall, 262; *McNaughten v. Partridge*, 11 Ohio, 223; *Anderson v. Tompkins*, 1 Brock. 462; *Bond v. Aitkin*, 6 W. & S. 165; *Johns v. Battin*, 30 Pa. St. 84; 3 Kent's Com. 49; *Gwinn v. Rooker*, 24 Mo. 291; *Wilson v. Hunter*, 14 Wis. 683; *Lowery v. Drew*, 18 Tex. 786; *Haynes v. Seachrest*, 13 Ia. 455.

Notwithstanding the correctness of this rule seems, in the majority of the

cases, to be conceded when applied to partnership transactions, yet the rigid rule of the common law, that the power to execute an instrument under seal should be given by an instrument of equal solemnity, and that the ratification of an instrument that the law requires to be under seal, must be under seal also, remains unaffected by the decisions above quoted, except when applied to such transactions. Story, in his work on Agency, after stating that "an agent or attorney may ordinarily be appointed by parol, in the broad sense of that term at the common law; that is, by a verbal declaration in writing, not under seal, or by acts and implications," proceeds to state, that one of the exceptions to this general rule is, "that whenever any act of agency is required to be done in the name of the principal, under seal, the authority to do the act must generally be conferred by an instrument under seal. Thus, for example, if the principal should authorize an agent to make a deed in his name, he must confer the authority on the agent by a deed. A mere unsealed writing will not be sufficient to make the execution of the deed by the agent valid at law; although a court of equity might, in such a case, compel the principal to confirm and give validity to the deed. The ground of this doctrine seems to be, that the power to execute an instrument under seal should be evidenced by an instrument of equal solemnity; by analogy to the known maxim of the common law, that a sealed contract can only be dissolved or released by an instrument of as high a dignity or solemnity." Story on Agency, secs. 47, 49.

So, in referring to the ratification by a principal of acts done by an agent without authority, it is said: "And a ratification once deliberately made, with a full knowledge of all the material circumstances, can not be recalled. Of course, this doctrine is to be understood with the qualification, that if the act of the agent be in the name of his principal, by an instrument necessarily under seal, without authority, the ratification must be under seal also; since (as we have seen) the principal is not bound by any act of his agent under seal, unless the authority of the principal has also been originally given to the agent under his seal. And, generally, if the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner." Id., sec. 242. The rule, as thus stated by Story, has been frequently referred to and followed by the authorities, and is still the law, except as it may have been modified in particular cases for commercial purposes: *Harrison v. Jackson*, 7 T. R. 207; *Hibblewhite v. McMorine*, 6 Mee. & W. 200; *Hunter v. Parker*, 7 Id. 322; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; S. C., 12 Wend. 525; *ante*, 152; *Wells v. Evans*, 20 Id. 251; *Despatch Line v. Bellamy W. Co.*, 12 N. H. 231; *Heath v. Nutter*, 50 Me. 378; *Paine v. Tucker*, 21 Id. 138; *Hanford v. McNair*, 9 Wend. 54; *Cooper v. Rankin*, 5 Binn. 613; *Gordon v. Bulkeley*, 14 Serg. & R. 331; *Stetson v. Patten*, 2 Greenl. 358; S. C., 11 Am. Dec. 111. The above rule must be taken with the limitation, that if the instrument which is executed by a person as the agent of another is not necessarily under seal, i. e., required by law to be sealed, it may be ratified by acts *in pais*, although executed under seal: *Lawrence v. Taylor*, 5 Hill, 113; *Hanford v. McNair*, 9 Wend. 54; *Evans v. Wells*, 22 Id. 340, 341; *Worrall v. Munn*, 5 N. Y. 240, 241; *Briggs v. Partridge*, 64 Id. 364. In *Worrall v. Munn*, 5 Id. 243, after considering the authorities upon this question, Paige, J., thus refers to the exception just stated: "These authorities show that there is no distinction between partners and other persons in the application of the modern rule, that wherever an instrument would be effectual without a seal, it will be valid and binding upon the principal, although executed under seal by an agent without authority by deed, if authorized by a previous parol authority, or subse-

quently ratified or adopted by parol." So an agent acting under parol authority may bind his principal by a contract for the sale of lands executed by him in the name of his principal: *Moody v. Smith*, 70 N. Y. 598.

In *Briggs v. Partridge*, 64 Id. 357, the question was presented, whether an executory contract under seal for the purchase of lands, executed by the vendee in his own name, could be enforced as a simple contract of another not mentioned in or as a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as his agent in the transaction. In answering this question in the negative the court say: "Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as a simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal; but if the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to, to ascertain the terms of the agreement. \* \* \*

"We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, or proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case."

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## COLWELL v. WOODS.

[3 WATTS, 188.]

**ABSOLUTE DEED WITH A COVENANT** by the grantee, that he is to reconvey upon the repayment of a certain sum and interest within a year, the grantor remaining in possession, constitutes a mortgage, and will be so construed, although it appears by parol that the parties did not so intend it.

**EJECTMENT**, brought by Colwell against James Woods, Lewis Peterson, and Peter Peterson, to recover a lot of land in Pittsburgh. It was admitted that Robert Lindell had been the owner of the lot; Colwell claimed title from his brother, who purchased the lot at execution sale against Lindell, on March 4, 1833. On the fifth of February, 1831, Lindell conveyed the lot in dispute to the defendant Woods, and the latter executed a covenant to reconvey upon the payment to him of ninety-five hundred dollars, and interest, within one year from said date. The agreement to reconvey was properly recorded. A large number of witnesses were examined, and their testimony all

tended to show that Woods refused to take a mortgage upon the lot in dispute, and that the deed and agreement to reconvey were not intended as a mortgage, but as an absolute sale, with the right to repurchase within a year. The execution sale to plaintiff's brother was made subject to the amount due to Woods. Plaintiff brought that amount into court, and offered to pay it. Verdict for defendants.

*Forward and Fetterman, for the plaintiff in error.*

*Dallas and Biddle, contra.*

By Court, KENNEDY, J. Several errors have been assigned in this case, but it appears to me that the only point in which the district court erred, that this court can review and correct, is in the charge to the jury; in which his honor, the judge, advised them that the deed of conveyance made by Lindell to Woods, and the bond given at the same time by Woods to Lindell, conditioned for a reconveyance of the property upon Lindell's reimbursing the purchase money, with interest thereon, beside costs and charges, which had been paid by Woods in consequence of the purchase, were upon their face *per se* a conditional sale, and not a mortgage.

The deed of conveyance and the bond, as was very properly stated by the judge in the court below, are to be considered as only one instrument, for they are constituent parts of the execution of the same agreement, executed both at the same time, as appears by a declaration to this effect contained in the bond. They also appear to have been both acknowledged at the same time, before the same officer, and to have been recorded within twenty days afterwards.

If the bond, or deed of defeasance, as it may be called, instead of having been put into the form of a distinct and separate instrument from the deed of conveyance, had been introduced into the latter in the form of a clause of defeasance, as is usually done in drawing mortgages, I apprehend that no one would have hesitated a moment to pronounce it a mortgage. Indeed, it seems to me, from the whole current of authorities on this subject, it could not have been considered otherwise either in law or equity. The conveyance and the bond then being deemed but constituent parts of one and the same instrument, must be regarded precisely in the same point of view, and of the same effect as if they had been joined together in the same writing, and had formed but one deed. The sum inserted in the conveyance as the consideration, is nine thousand five hun-

dred dollars; and it is expressly provided by the bond, that upon the repayment of this sum by Lindell within one year thereafter, together with the interest thereon, and the charges incurred by Woods in consequence of the purchase, that the latter should reconvey the property to the former. The purchase money being to be repaid with interest tends rather to show that it was a loan in reality. And as it was to be repaid with interest in the course of a year, it goes to show that it was not the understanding of the parties that Woods should take possession of the property under the conveyance during that time, because it would have been inequitable as well as usurious in him to have received both the rents of the property and the interest on the money. And this tends still further to show that the money advanced was a loan, and that the conveyance and bond taken together were to be a security for the repayment of it; that is, to be considered a mortgage and not a conditional purchase.

And again, from the circumstance that Woods was not to take the possession of the property until after the year had elapsed, it may reasonably be inferred that in the estimation of both parties it was worth more than the money advanced upon it, by at least the amount of the interest thereon for the year; which likewise goes to show that the transaction was in reality founded on a loan of money and not upon a sum paid for the property, which was considered and agreed on by both parties at the time to be a fair and full price for it. And I am inclined to believe that it is the advancement of what at the time was considered by both parties a fair price for the property, when it consists of real estate, taken also in connection with their intention, that must give to the transaction the character of a conditional purchase or a defeasible purchase subject to a repurchase, instead of a mortgage: *Mellor v. Lees*, 2 Atk. 495; *Wharf v. Howell*, 5 Binn. 503; *Stoevers v. Stoevers*, 9 Serg. & R. 447. I consider the case of *Manlove v. Bale and Bruton*, 2 Vern. 84, very like the present, only more strongly indicative perhaps of an intention in the parties to make it a conditional sale. Bruton having a church lease for three lives in 1664, conveyed it to the father of Bale in consideration of five hundred and fifty pounds; the conveyance was absolute: but Bale, the purchaser, by writing under his hand and seal, agreed that if Bruton, the vendor, should, at the end of one year then next ensuing, pay him six hundred pounds, he would reconvey. The six hundred pounds were not paid. Two of the lives died, and the lease

was renewed twice by the defendant Bale and his father. It was held to be a mortgage: and twenty years after the first conveyance, Manlove, to whom Bruton had assigned the equity of redemption in satisfaction of a debt, was adjudged entitled to redeem; and accordingly a decree of redemption was passed in his favor, on his paying the five hundred and fifty pounds with interest, together with the fines paid in order to procure renewals of the lease; and Bale at the same time to account for the profits from the death of his father; but anterior to that they were to be set off against the interest.

Judgment reversed, and a *venire de novo* awarded.

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Cited upon the following points: That parol evidence is admissible to show that a deed absolute was intended as a mortgage, but inadmissible to show that a formal mortgage was intended to be a conditional sale: *Kunkle v. Wolfersberger*, 6 Watts, 130; *Brown v. Nickle*, 6 Pa. St. 390; *Woods v. Wallace*, 22 Id. 177. That a deed and a separate defeasance constitute but one instrument, and when given as security for the payment of money, will be treated as a mortgage: *Kerr v. Gilmore*, 6 Watts, 409; *Jaques v. Weeks*, 7 Id. 268; *Kelly v. Thompson*, Id. 405; *Rulenbaugh v. Ludwick*, 31 Pa. St. 138; *Houser v. Lamont*, 55 Id. 316; *Harper's appeal*, 64 Id. 319. That where a transaction is a sale at a fair value, and not a loan, it will be so held: *Spering's appeal*, 60 Id. 210. In *Heister v. Maderia*, 3 W. & S. 384, it was held, citing the principal case, that where the plaintiff and defendant, in an execution, agreed at the sheriff's sale that certain property should be struck down and conveyed to the plaintiff, upon condition that he should reconvey to the defendant upon the payment of the amount due on the execution within a specified time, that such agreement constituted a mortgage, and that upon a sale of such property after the specified time, the plaintiff should account to the defendant for the excess received over and above the amount due on the execution.

In the note to *Chase's case*, 17 Am. Dec. 300, the question as to when a deed, absolute in form, with an agreement to reconvey, constitutes a mortgage, and when a conditional sale, is discussed and considered. In *Bennet v. Holt*, 24 Id. 455, the intention of the parties was held to govern in determining whether a transaction constitutes a mortgage or a sale, with a right to repurchase, and that such intent is to be ascertained from the circumstances of each case. See note to *Thompson v. Patton*, 15 Id. 47, as to the admissibility of parol evidence to show that a deed absolute was intended as a mortgage.

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## CLARK v. RUSSEL.

[3 WATTS, 213.]

PROMISE TO FORBEAR IN GENERAL, without adding any particular time, is to be understood a total forbearance.

PROMISE TO PAY THE DEBT OF ANOTHER, in consideration of a general forbearance, can not be enforced, if the original debtor is subsequently sued.

ACTION on the case by Russel against Clark. It appeared from the declaration, that on November 10, 1818, John and Joseph Patterson were indebted to plaintiff in the sum of twelve hundred and nine dollars and fifty cents, and that in consideration that plaintiff "would extend as much indulgence as he could for the payment of the said obligation, he, the said defendant, undertook, and then and there promised the plaintiff to pay the said sum of money as soon as circumstances would reasonably admit." That plaintiff did extend such indulgence for the payment of said indebtedness until August 7, 1830, "and until there was reason to believe that further indulgence would endanger the recovery of the money." That by reason of said agreement defendant had become liable to pay said amount, which he had failed to do. Defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*. At the trial plaintiff produced the note of John and Joseph Patterson to him, dated April 26, 1814, for the amount above stated. Also the defendant's letter promising to pay said indebtedness, as follows: "November 10, 1818. Dear Sir: John Patterson and myself have purchased out Joseph Patterson's interest in the tan-yard, and have undertaken to pay you the amount of the obligation you hold on John and Joseph Patterson. As much indulgence as you can possibly extend to us will be gratefully acknowledged. I have entered into this business with a view of accommodating the Mr. Pattersons, and my sole object in addressing you these lines is, that you may consider them obligatory on me for the payment of the money, which shall be done as soon as circumstances will reasonably admit. I am, etc., William Clark." Plaintiff also produced a judgment on the note against the Pattersons, entered in August, 1830. The other facts are stated in the opinion. Judgment for Russel.

*Derrickson*, for the plaintiff in error.

*Riddle*, for the defendant in error.

By Court, GIBSON, C. J. The proposed forbearance was evidently to be perpetual as to the obligors, the indulgence spoken of being referable to those who were to pay the debt. The defendant, reciting that he and John Patterson had undertaken to pay the obligation of John and Joseph Patterson, requests indulgence: and for whom? Not for the obligors, but, as is apparent from the use of the word "us," for John and himself, who had agreed with Joseph to substitute their joint responsibility for the joint and several responsibility of the

obligors. It is undoubted that, had the plaintiff pressed his original security, Joseph might have been compelled to press the agreement of the defendant and John, and that the defendant might thus have been affected indirectly. Had he, indeed, proposed to contract but an indirect responsibility, it might have been intended that the indulgence sought, as a consequence, was to follow the nature of it. But he proposed positively and directly to pay the debt as soon as circumstances would permit; and, in the absence of an intimation bearing the other way, it is reasonable to infer that the indulgence was meant to correspond with the liability proposed as the consideration of it. The responsibility proposed, therefore, being direct, the indulgence was also to be direct. But not only was indulgence to be extended to the new contractors, but also forbearance to the original obligor, as necessary to carry out all the parts of the arrangement. It was for the benefit of the latter that the defendant had come into the transaction, and they could be benefited as obligors but by going out of it at least for a time. But this implied condition of forbearance being general, is also perpetual, as was determined in *Haymaker v. Eberly*, 2 Binn. 510, where it is said, that a promise to forbear in general, without adding any particular time, is to be understood a total forbearance. The plaintiff then could accept the defendant's proposal but on the conditions expressed or implied in it; and having violated one of these by recurring to the Messrs. Patterson, on the original security, he has failed to perform the consideration of the defendant's promise, and can not maintain an action on it.

The decision might be rested at this point; but a principal exception below, and therefore necessary to be decided here, is, that taking the defendant's proposal of forbearance to be such as the judge assumed it to be, yet it does not appear to have been accepted; for the plaintiff certainly can not reserve himself for events and choose his time to pursue the principal or the guaranty, as the solvency of the one or the other may dictate. There must be a *bona fide* forbearance at the defendant's instance and request. The only case which might be thought to conflict with this is *Yard v. Eland*, 1 Ld. Raym. 368, in which an exception was taken to the declaration, "that it is not averred that when the defendant desired a day of payment the plaintiff consented to give it to him; but it is only said *quod, assumptioni fidem adhibens*, he forbore, so that the defendant might remain in fear all the time, and the consideration then



fails. But to this it was answered by the court that, "it is averred the plaintiff forbore, etc., which is sufficient consent." But it is to be remarked that this was said on an exception to the declaration, and it amounts to no more than that for purposes of pleading; performance *fidem adhibens assumptioni*, is equivalent to performance at the defendant's instance and request; for no one would pretend that forbearance induced by any other cause would charge him. The court never meant to say that. In fact the words literally import that the act was done on the credit of the defendant's assumption, which is but another form of saying it was done at his instance. On the other hand it is not essential that the plaintiff should have bound himself to forbear or stay proceedings on the original security so as to give an action for a breach of promise. Such an agreement would undoubtedly be a valid consideration, and might be so laid, according to the precedents in cases of mutual promises which are reciprocally the consideration of each other, and which must, therefore, be simultaneous, concurrent, and equally obligatory: but where the consideration is not promise for promise, less than a positive engagement to do an act which, when done, is to be the meritorious cause of the promise, may be a sufficient consideration for it. A positive act is more evincive of the distinction than a negative one.

If I promise my neighbor to compensate him if he will do a specific act of service for me, and he does it in consequence, he may maintain an action though he had not bound himself to do it. The consideration of such a promise belongs to the class called executory, the promise itself being in its nature conditional. But what if the defendant should desist, having performed the act in part? He would forfeit his interest in the promise; neither could he recover a *quantum meruit*; and the parties would be where they began. But the promisor may have sustained damage, or at least disappointment, by the other's default. He undoubtedly may; but it is his folly not to guard against it by exacting a mutual engagement instead of making a conditional one, which leaves the party employed to earn the promised reward or not at his pleasure. Now, the condition of forbearance belongs to the executory class, being usually so stated in the precedents; and it differs in no particular from the instance put, except that the act is of a negative instead of an affirmative nature, and it is this negative nature, rendering as it does the motive of the act equivocal, that induces the mind to hesitate. It might be supposed, from an

expression of the judge who delivered the judgment in *Bisler v. Ream*, 3 Penn. 285, that a positive engagement to forbear was thought indispensable in all cases; but it is intimated in the succeeding sentences, that actual forbearance at the instance of the defendant may also be sufficient, on the principle that a single spark of benefit received on the foot of the promise is a valid consideration. But in the actual state of our law on the subject, being without that part of the statute of frauds which is interposed for the protection of third persons elsewhere, policy dictates, in the absence of such an agreement, that clear and satisfactory proof be exacted that the request was in fact the exciting cause.

The question then is, whether it sufficiently appeared in the case in hand that the plaintiff had forborne at the defendant's instance, in order to warrant the direction, and verdict produced by it. The evidence consisted of the defendant's letter of request; the original obligation with separate recoveries on it; and parol proof that the obligors had continued to be in good credit till the suits were brought. There were no extrinsic circumstances to show that the plaintiff's forbearance had not been merely voluntary, and there is nothing in the nature of the act itself to indicate the motive for it. Positive acts, as already said, are less equivocal, and usually exhibit the exciting cause of their performance, as in the case of delivery pursuant to a sale of goods; but negative acts, unconnected with circumstances of explanation, and more particularly acts of forbearance, are referable to no particular cause: and such is their legitimate effect, after the reception of a proposal not responded to, as was the case here, by word, deed, or sensible change of action. Who can say that the plaintiff would have pressed the Messrs. Patterson at an earlier day, if no overture for indulgence had been made? To avail himself of a proposal received without reply, he ought to have shown a discontinuance of measures, demonstrative of an immediate resort to compulsion; or at the very least, that he had continued to forbear while the obligors were notoriously in failing circumstances. Of all such circumstances, the case was destitute; and even if there had been evidence to raise the question of assent to the defendant's proposal, it ought to have been left to the jury, as an open one, instead of the positive instruction given that the defendant was bound to pay the bond according to the terms of his letter.

Judgment reversed.

Cited upon the following points: That a promise to pay, in consideration that the plaintiff would wait, forbear, or give time, indefinitely, or for a reasonable time, at the instance and request of the defendant, will maintain an action against the promisor: *Downing v. Funk*, 5 Rawle, 69; *Kean v. McKinsey*, 2 Pa. St. 31. That an actual forbearance is not sufficient to support an action, unless it was in pursuance of a mutual agreement between the parties, the consideration being the promise by one party to forbear in consideration of the promise by the other to pay: *Snyder v. Leibengood*, 4 Pa. St. 307; *Hamilton v. Lycoming Ins. Co.*, 5 Id. 344; *Bieber v. Beck*, 6 Id. 200; *Shupe v. Galbraith*, 32 Id. 12. That if a party promise another a definite or a reasonable reward if he will do a particular thing, the party promised is not bound to do it; yet if he does do it, he is entitled to the reward: *Weaver v. Wood*, 9 Id. 221; *Morrow v. Waltz*, 18 Id. 120.

## CREST v. JACK.

[3 WATTS, 232.]

**IMPROVEMENTS PLACED BY A STRANGER** upon the land of another, become the latter's property.

**FOUNDATION OF PROPERTY** consists in its being an exclusive right, and persons other than the owner can not impose burdens on it, or impair its enjoyment without the latter's permission, or by color of legal authority.

**ONE JOINT TENANT, OR TENANT IN COMMON**, can not erect buildings or make improvements on the common property without the consent of his co-tenants, and then claim to hold the common property until reimbursed a proportion of the moneys expended.

**WHERE THE OWNER OF LAND STANDS BY** and permits another to expend his money in improving it, he may, in equity, be compelled to surrender his title, on receiving compensation, or else to pay for the improvements, provided he has, by his conduct, encouraged the other to make the improvements, or has so conducted himself, while they were being placed upon the land, as to make it a fraud in him to take them without paying their value.

**MERE SILENCE ON THE PART OF THE OWNER** of land will not be sufficient in equity to relieve one who is perfectly acquainted with the rights, or has the means of becoming so, and yet willfully insists on expending money in the improvement thereof.

**EJECTMENT**, by Wilson Jack against Mary Crest, Thomas Blair, and others to recover the one undivided tenth of a house and lots of ground in Kittaning. Samuel Jack and John Crest were the owners as tenants in common of the property in dispute. The former died intestate, and his estate descended to his four brothers and one sister, Matthew, Henry, William, Wilson, and Mary. Thomas Blair intermarried with a daughter of Mary who was the widow of John Crest, went into possession of the lots, and built a house thereon. Wilson Jack did not consent to the improvements, and did not notify Blair to

desist, although he was present at Kittaning when the house was being built. It appeared that plaintiff and Blair were not on speaking terms at the time. It was insisted that plaintiff could not recover until he had reimbursed Blair his proportion of the moneys expended in building the house. The court ruled otherwise, and verdict found for plaintiff.

*Buffington and Forward*, for the plaintiff in error.

*White, contra.*

By Court, SERGEANT, J. If a stranger enter on the land of another and make improvements by erecting buildings, they become the property of the owner of the land. Were it not so, a person might gain a title by the commission of a trespass, and strip his neighbor of his estate, or subject him to compulsory expenses, under the pretext of improving his property. The foundation of property consists in its being an exclusive right: other persons can not impair its enjoyment, or impose burdens on it by intermeddling with it without the owner's leave, or color of legal authority. And this doctrine holds as well with respect to joint owners as to strangers. One joint tenant or tenant in common can not erect buildings or make improvements on the common property without the consent of the rest, and then claim to hold until reimbursed a proportion of the moneys expended: nor can he authorize this to be done by a third person. If he desires to improve without asking the assent of a co-proprietor, his course is to have his share set off by partition, and to deal with that as he may see proper.

This is the rule at law. There are, however, cases, in which an owner of land standing by and permitting another to expend his money in improving it, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement. But in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the one party acts ignorantly and without the means of better information, and the other remains silent, when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet will-

fully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril: 1 Eq. Abr. 355; 2 Id. 522; 4 Serg. & R. 244 [*Le Fevre v. Le Fevre*, 8 Am. Dec. 696]; 2 Atk. 83; 3 Id. 692; 2 Rawle, 92 [*Alexander v. Kerr*, 19 Am. Dec. 616]; 3 Id. 326.

In the case before us, there is no evidence that the plaintiff in any respect encouraged or connived at the erection of these buildings by T. Blair. On the contrary, an avowed hostility existed between them: his consent was not desired, and there was no circumstance from which it could, with the least degree of plausibility, be inferred. It would rather seem that it must have been known to all the family that if asked it would be refused. Nor was the plaintiff bound to notify Blair of his right in the land, or of his dissent to the erection of the buildings. Blair was well acquainted with the titles of the respective parties, having acted as agent for the former owner in receiving the rents; and if he was not, he was bound to inquire into the title before he undertook to appropriate the lot. It was matter of record, accessible to all. The assent or encouragement of the brothers might, in equity, preclude them, but would not affect the right of the plaintiff.

Judgment affirmed.

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Cited upon the following points: That one who, knowingly, though passively, suffers another to purchase and spend money on land, under an erroneous opinion of title, without making known his claim thereto, will not afterwards be permitted to assert such claim against such person: *Carr v. Wallace*, 7 Watts, 401. That equity will not, on the mere ground of silence of the owner, relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the lands of such owner, without obtaining or asking his consent: *Marsh v. Weckerly*, 13 Pa. St. 252; *Knouff v. Thompson*, 16 Id. 364; *Hill v. Epley*, 31 Id. 334; *Rogers v. Walker*, 6 Id. 374. See *Chapman v. Chapman*, 59 Id. 219, as to when the owner of land will, by his silence, be prevented from taking advantage of improvements erected thereon by another. That equity will not relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to expend money upon the land of another without his consent: *Glidden v. Strupler*, 52 Id. 405. That a person is only estopped from alleging the truth when his assertion of a falsehood, or his silence, has been the inducement to action by another party, which would result in loss if he was permitted to gainsay what he had before asserted, or induced the other to believe by his acts: *Patterson v. Lytle*, 11 Id. 56; see *Commonwealth v. Moltz*, 10 Id. 531. That a tenant in common can not claim for improvements made, without the consent of his co-tenants upon the common property: *Dech's appeal*, 57 Id. 472.

**IMPROVEMENTS.**—*Bona fide* occupant is entitled to value of, on eviction. *Whilledge v. Wait*, 2 Am. Dec. 721; *Jackson v. Loomis*, 15 Id. 347. In the note to the latter case, the subject of compensation for improvements in ejectment is considered. Equity will not, on the ground of mere silence, relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in spending money on the land of another, without obtaining or asking his consent: *Alexander v. Kerr*, 19 Id. 616; note 626.

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## COMEGYS v. CARLEY.

[3 WATTS, 280.]

**QUESTIONS IN RELATION TO BOUNDARY LINES** are for the determination of the jury, on the principle that the lines on the ground constitute the true survey.

**STATUTE OF LIMITATION DOES NOT RUN IN FAVOR OF ONE** who is the owner of a tract of land, and the agent of an adjoining tract, so as to give him a title to a part of the land of his principal, which has been occupied by him under a mistake as to the true boundary line.

**EJECTMENT**, by Cornelius Comegys against Louisa Carley and Job Carley, for eighty-five acres of land. The parties were the owners of adjoining surveys, the title to which was perfect. The dispute arose out of a question of boundary. Considerable testimony was taken upon this question, and the court instructed the jury, that "it is well settled that the lines and corners found on the ground are the true survey, and control the draft of the survey, and the courses and distances in the patent. Is the line described by the witnesses the line running on the ground dividing lots number thirty-seven and forty-one, at the time of making the survey? If it is, the plaintiff can not recover. If it is not, then the courses and distances in the patent will govern and the plaintiff would be entitled to recover, unless prevented by the statute of limitations." Defendants claimed under one Muller, who, at the time he owned the land now held by them, had cleared and occupied the land in dispute for more than twenty-one years. At the time he took possession he was plaintiff's agent, and had charge of the adjoining survey, and his possession of the disputed land arose out of a misapprehension of the true boundary of his own land. Judgment for plaintiff.

*Forward*, for the plaintiff in error.

*Fetterman*, for the defendant in error.

By Court, GIBSON, C. J. As the lines on the ground constitute the survey, the question of boundary was properly left

to the jury on that principle; but the question of adverse possession was in part for the court. Doctor Basse Muller being at the same time an agent of the plaintiff and the proprietor of the adjoining lot, and believing the land now in dispute to be within his boundary, let it to a tenant, who cleared and cultivated a part of it. It is plain, and the fact does not seem to have been contested, that he did not mean to hold adversely to the plaintiff's title; but if that were otherwise, it would not strengthen the defendant's case. He represented that title as well as his own; and applying the maxim, that different rights united in the same person are to be treated as if they existed in different persons, it follows that the actual possession was taken in mutual misapprehension and ignorance of the actual boundary. If it were adverse, therefore, that was a consequence not intended. It was said by the chief justice, in *Wallace v. Duffield*, 2 Serg. & R. 527 [7 Am. Dec. 660], that possession may be shown not to have been adverse, by facts and circumstances; and such, I should think, are those which indicate a saving of the contingent rights of another, instead of a disregard of claims that might be made thereafter. In accordance with this distinction, it was held in *Gray v. McCreary*, 4 Yeates, 496, that in questions of boundary, evidence of possession does not apply with the same force that it does where the entire tract of the claimant was held; and it seems to have been considered as decisive, that the party whose legal possession had been displaced was not apprised of the fact. That case is not to be distinguished from the present, except that in its circumstances it is not so strong: but its force and bearing are greatly augmented by the definition of adverse possession given in *Hawk v. Senseman*, 6 Serg. & R. 23, in which it was required to be "actual, continued, visible, notorious, distinct, and hostile." Its very nature challenges the right of every opposing claimant, and invites him into the arena of litigation, where his title is to be postponed but for having postponed the day of trial beyond the period prescribed by the statute; and it necessarily exhibits something to quicken him and put him on his guard. I do not say that there may not be an adverse possession in the case of an unsettled boundary; on the contrary, I admit that a party may make out an incontestable title under the statute where the boundary was in dispute; but it is not easy to understand why a title should be postponed for the supposed laches of the proprietor, and in favor of one who did not profess to hold against it, when the intrusion was an accident equally unsuspected by

both. The ignorance of the party to be affected was held to be decisive in *Gray v. McCreary*, in accordance with the construction made of another branch of the statute, which is held to run against an action founded on a secret fraud, but from the time of its discovery. The analogy is still more apposite to the present case; for it would have been a positive and secret fraud in Doctor Muller had he taken possession adversely to the title of one who had committed his interest to his management, and it is unconscionable in those who derive title from him to attempt an advantage from it. Under these circumstances, the jury were properly instructed that the statute would not begin to run before the plaintiff had notice that the possession was held adversely to him, or at least before Doctor Muller had ceased to be his agent.

Judgment affirmed.

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Cited in *Miller v. Keene*, 5 Watts, 349, to the point that possession taken adversely by an agent of the owner, would be an abuse of confidence, and therefore insufficient to bar him. Also in *Sailor v. Hertzoog*, 2 Pa. St. 185, and *Calhoun v. Cook*, 9 Id. 226, to the effect that possession taken in mutual mistake of one's rights is not adverse. In *Harvey v. Harbach*, 4 Phila. 51, the principal case was relied upon to show that acts and declarations of a party are always admissible to show whether an antecedent possession was adverse or not. Also cited in *Lamb v. Irwin*, 69 Pa. St. 443.

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## LIGGET v. SMITH.

[3 WATTS, 331.]

COVENANT MAY BE MAINTAINED upon a contract in writing by which plaintiff agreed to do the brick work on the defendant's warehouse, to recover the contract price for the work performed, although not done according to the contract; but the plaintiff's recovery will be limited to the price agreed upon, less a sum sufficient to compensate the defendant for the damages resulting from a failure to perform the work as agreed.

COVENANT, brought by Smith against Ligget. Verdict was rendered in favor of Smith for fifty-seven dollars and fifty-eight cents. The facts are stated in the opinion.

*Fetterman*, for the plaintiff in error.

*Metcalf and Burke*, contra.

By Court, GIBSON, C. J. Previous to the decision of *Boone v. Eyre*, 1 H. Bl. 273, note (a), it seems to have been taken that nothing less than entire performance of a mutual covenant would entitle the party to his action for a breach on the other



side. In that case, however, a more reasonable and just rule was adopted, by which a mutual or dependent covenant, which goes but to a part of the consideration on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. This is distinctly the principle; and it has been established by a train of decisions, both in England and this country, which it is unnecessary to quote. Then apply it to the circumstances of our case. The plaintiff had covenanted to build a warehouse for the defendant, and "to fill in all the brick work with mortar, or what is usually termed flushing in, or filling in all the openings at each corner of the bricks with mortar, as they are laid." The warehouse was built; but it appeared that all the courses were not flushed in according to the contract; and that the want of it detracted from the strength of the building, which was necessarily destined to the bearing of unusual burdens. Did then this covenant go to the whole of the consideration, or but to a part of it? That it went but to a part is shown by the fact that it has been used as a warehouse since; and if it were entirely unfit for the original purpose, that ground of defense should have been taken at the trial, and the fact have been required to be put to the jury. The point however was not made, and we are to consider the case as if it could not have been successfully made. The result is, that as the building, as finished, was not unfit for the use to which it was destined, though less fit than it was stipulated to be, the imperfection in its construction did not reach the entire consideration, and that the plaintiff was properly allowed to recover his demand, less a sum sufficient to compensate his defective execution of the contract.

Judgment affirmed.

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Cited with approval in *Danville B. Co. v. Pomroy*, 15 Pa. St. 159, and *Noble v. James*, 2 Grant Cas. 284.

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## BLACKSTONE v. BLACKSTONE.

[3 WARRS, 335.]

A LEGACY PROPERLY SPECIFIC, and not merely specific in its nature by being charged on a specific fund, is adeemed by any change of its state or form, effected by the act of the testator, which makes the *corpus* of the legacy at his death different from what it was when the will was made. Where the change in the thing bequeathed is effected by fraud or by operation of law, it will not be adeemed.

TESTATOR'S INTENTION IS GENERALLY NOT TAKEN into account in determining the existence of a specific legacy at the time of his death.

A LEGACY, BY WHICH A TESTATOR BEQUEATHED "all my two hundred and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania," etc., is specific, and becomes extinguished by a sale of the stock in the testator's life-time.

ACTION to recover a legacy, brought by Henry Blackstone against James Hurst, the executor of the estate of James Blackstone, deceased. On September 4, 1819, the deceased executed his will, containing a provision by which he bequeathed to his executor, in trust, for his two grandsons, Henry and James, "my two hundred and fifty shares of capital stock, which I hold in the Union Bank of Pennsylvania, together with such interest as may have accrued thereon, from the last dividend immediately preceding my decease," to be paid to them when they shall respectively arrive at the age of twenty-one years. Plaintiff offered to prove that the deceased, prior to his death, and subsequent to making his will, upon being informed that the stock was in danger of depreciating in value, sold it to two parties, and took their bond therefor, payable May 12, 1821, and that he declared at the time that said bond should go to his grandsons in lieu of the stock. That the bond was unpaid, and had come to the executor's hands since the death of the testator. It was agreed that this testimony was true, and it was admitted with the agreement that the court should decide upon its competency. Plaintiff had judgment.

*Alexander and Forward*, for the plaintiff in error.

*Ewing*, for the defendant in error.

By Court, GIBSON, C. J. The modern decisions on this head, can be reconciled to the doctrine of Swinburne but by understanding him to speak exclusively in reference to pecuniary legacies. It is certainly now held for clear law, that a legacy properly specific, and not merely specific in its nature, by being charged on a specific fund, is adeemed, or, to speak more properly, extinguished, by any change of its state or form, effected, not by fraud, or operation of law, but by the act of the testator, whatever be its purpose, which makes the *corpus* of the legacy, at his death, a different thing from what is indicated by the terms of the description. Swinburne recognizes no distinction in this respect between pecuniary and specific legacies of debts, annuities, or stock; but puts the question of ademption exclusively, on the fact of intention, which, in respect to

this particular sort of ademption, is an immaterial circumstance. Thus he says (part 7, section 20) that the bequest of a bond or debt is not extinguished by voluntary payment of it; or even by payment exacted, if it appear by the testator's declarations or actions, that no extinguishment was contemplated. The cases cited in illustration of his position by his learned editor and annotator, are undoubted instances of the pecuniary class. The bequest in *Orme v. Smith*, 2 Vern. 681, more fully stated in Mr. Powell's note, was certainly such, being a bequest of five hundred pounds in *numero*; "that is to say," proceeds the testator, "the bond and judgment he gave me for four hundred pounds, and one hundred pounds in money." The bond and judgment were evidently not treated as a specific subject of the testator's bounty, but as the anticipated medium of its satisfaction; and the receipt of the debt by him, seems therefore to have been properly disregarded as a proof of ademption. And in *Thomond v. Suffolk*, 1 P. Wms. 461, where the testator had bequeathed two several bond debts of two thousand pounds each, with proviso, "that in case all or any part of these two sums should be paid in before the testatrix's death, then the said testatrix gives to the said legatee four thousand pounds, or so much money as the principal money so paid in should amount to," it was held that a release of one of the debts was not an ademption *pro tanto*, and evidently because the bonds were spoken of but as a fund, the object being to secure the legacy from failing in any event. For the same reason, a bequest of forty pounds out of a debt due the testatrix was held, in *Ford v. Fleming*, 2 P. Wms. 469, not to be adeemed by being called in, it being presumed that the debt was considered to be in danger. The question was put on the ground of intention, and the legacy was a pecuniary one for reasons that will appear in the cases to be presently quoted. In *Rider v. Wager*, Id. 329, where the legacy was part of a debt, the decree that a receipt of the debt in the testator's life-time did not defeat the bequest, was rested expressly on the difference between pecuniary and specific legacies.

Finally, in *Partridge v. Partridge*, Cas. temp. Talb. 226, the testator having had one thousand eight hundred pounds Capital South Sea stock at the date of his will, by which he bequeathed one thousand pounds of it, but having subsequently reduced the quantity to two hundred pounds, and then increased it to one thousand six hundred pounds, three fourths of which were turned into annuities by an intervening act of par-

liament, it was determined that neither the intermediate disposal, nor the involuntary transmutation, was an ademption of any part of the legacy. In respect to this case it is to be remarked that the bequest was not of the identical stock had at the date of the will, which is material (Roper on Legacies, 239), and that the stock or its substitute had at the death equally answered the description; that the transmutation being by operation of law, would not have affected the question of ademption, even in the case of a specific legacy; and that for these reasons Lord Talbot considered the legacy to be a pecuniary one. In Swinburne's day, then, the principles of the present question had not been carried out. That the distinction since taken between general and specific bequests of money or securities, should not be noticed in his work, will not seem strange to those who consider that it was written two hundred and fifty years ago, when the distinction was unknown. But that the annihilation of a specific legacy, or such a change in its state as makes it another thing, annuls the bequest, for reasons paramount to considerations of intention, is now too firmly settled to be questioned. The principle is definitely established by *Sleech v. Thornington*, 2 Ves. 561; *Drinkwater v. Falconer*, Id. 623; *Humphreys v. Humphreys*, 2 Cox, 184, and *Birch v. Baker*, Mos. 373. The remaining question is, whether the legacy before us is a specific one. The bequest is of "all my two hundred and fifty shares of capital stock which I hold in the Union Bank of Pennsylvania." The words "which I hold," certainly individuate the stock as a *corpus* with as much precision as would the words "standing in my name," which made the bequest specific in *Sleech v. Thornington*; or the words "all the stock which I have in the three per cents," which was allowed to have the same effect in *Humphreys v. Humphreys*; and it is even more specific than the words in *Drinkwater v. Falconer*, "to be paid out of my dividends of four hundred pounds in the joint stock of South Sea annuities, now standing in the company's books in my name," which were held to be sufficiently so, though the stock was described as a fund for payment, because the residue was given in nearly the same terms and charged with the preceding bequest.

It is certainly true that the presumption of intention is favorable to general legacies in the first instance, and that it requires clear proofs of a restrictive intention to repel it; but the word "my" prefixed to the word "annuities" or stock, has always been held sufficient of it itself to do so, though the mere

possession of such annuities or stock at the date of the will, without words of reference to fix its identity as the subject of bequest, has come short of it. But what is decisive here is, that the stock was directed to be "transferred" by the executors to the legatees on their arrival at full age. Beside the dividend accruing at the testator's death is given in the same way: all which shows it to have been his expectation and intent to die possessed of this identical stock, and to transmit it specifically to the legatees. The legacy then was a specific one; and whatever was the motive for its extinction or change of being, whether to destroy it or to preserve it for the legatees; and whatever be the evidence of such motive; it ceased to have the specific existence ascribed to it in the will, and neither the bond taken as a substitute for it, nor its value, can be demanded from the testator's estate. Judgment below reversed, and judgment here for defendants.

Justice KENNEDY took no part in the decision, having been counsel in the cause.

Justice HUSTON was absent in consequence of indisposition.

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The decision in the principal case as to what constitutes a specific legacy, has been approved and followed in *Ludlam's estate*, 1 Par. 119; *Alsop's appeal*, 9 Pa. St. 387; and *Ludlam's estate*, 13 Id. 192. In *Hoke v. Herman*, 21 Id. 301, citing the principal case, the ademption of a specific legacy was held not to depend upon the intention of the testator; that if the thing specifically bequeathed does not remain at the testator's death, there is an end of the legacy, no matter how it may have been disposed of.

SPECIFIC LEGACIES, WHAT ARE.—Defined in *Walton v. Walton*, 11 Am. Dec. 468, note. They are to be preferred to general or pecuniary legacies: *Gallego's Executors v. Attorney-general*, 24 Id. 650.

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## JOHNSON v. BOYER.

[3 WATTS, 376.]

AN AGREEMENT BY THE PLAINTIFF to a temporary stay of execution, in consideration of the defendant confessing judgment, will not exonerate the special bail in the action.

SCIRE FACIAS upon a recognizance of special bail, by Boyer against Johnson. The former commenced an action against one John Snevily, in the court of common pleas, of Dauphin county, and sued out a *ca. ad respondendum*, returnable at the April term, 1832. On May 21, 1832, the defendant entered into the bond sued on, as special bail for Snevily. On June 9,

1832, the latter confessed judgment in said action, with an agreement on plaintiff's part that execution should be stayed until August 9, 1832. A *ca. ad satisfaciendum* was issued on this judgment August 10, 1832, and was returned *non est inventus*. Plaintiff had judgment.

*McClure*, for the plaintiff in error.

*McCormick*, for the defendant in error.

By Court, GIBSON, C. J. An exemption from execution for a further time than the defendant would have had if the plaintiff had proceeded regularly to judgment, may perhaps discharge the bail, on the principle which regulates the responsibility of sureties in equity; though even that is said to be a modern refinement, and not to be too much encouraged. However, no such exemption is pretended here. But the bail may be discharged by circumstances of stipulated indulgence short of a grant of such further time. Their power to arrest the defendant and keep him imprisoned, is derived from the right of the plaintiff to have satisfaction of the body, and ceases with it, whether the cessation be induced by the act of the plaintiff or the act of the law. Hence it has been held by the English courts, that the defendant's succession to a peerage, or to a seat in the house of commons, or his transportation, banishment, death, or whatever else relieves or prevents him from making satisfaction with his body before the bail are fixed, exonerates them without a surrender. But it has been determined that a *cognovit*, taken on terms of personal exemption for a period no greater than the defendant would otherwise have had, produces no such effect.

The solidity of this principle is denied by Mr. Theobald in his treatise on the law of principal and surety, 216, note (c), on the ground that a suspension of the right of execution makes the defendant a freeman; and if a freeman against the plaintiff, then a freeman against the bail, substituted, as they are, for the plaintiff, with the same capacity, and no other, to affect the defendant's liberty. The decisions to the point are not authority here, and it is consequently necessary to see whether the objections to them are founded in reason. How far, then, the defendant is made a freeman by a limited stay of execution, whether absolutely and permanently, or but conditionally and temporarily, seems to be the matter most material to an inquiry into the foundation of the rule on principle, and must depend on the terms of the stipulation, or where these are inexplicit, on

the nature of it. For if an agreement to postpone the time of execution be not a virtual and permanent relinquishment of the right to control the defendant's liberty, it is not easy to see how it can release the bail, an exact performance of whose recognizance is dispensed with only where a surrender would be nugatory, the principal being entitled to be set at large the same instant. But would such a postponement entitle a defendant, in custody at the time, to be discharged without a condition to that effect on the *cognovit*? If such a condition could be fairly implied, the bail would undoubtedly be exonerated without a surrender. But it is not nugatory where the body remains contingently liable; nor does it follow, on the very principle of the argument, that the bail are further exonerated than the defendant is himself. Why then should they not be bound to produce him, according to the exigence of their recognizance, where the plaintiff's right to demand him has ceased to be dormant and is put into immediate action? They can not be injured by postponement for a period less than would entitle them to equitable relief; because they may relieve themselves by surrendering the plaintiff and leaving his right to liberation to be settled by the parties to the *cognovit*. They may surrender him on the original arrest, though an execution be not in the hands of the sheriff waiting for him. It is said in effect, that though the immediate power of imprisonment is transferred to the bail, the plaintiff must retain the power of having it put in action by an execution; and that he parts for a time even with these by a stay of execution. But he has no such means before the recovery of judgment, till which time there is intermediately an entire cessation of his power, and the absence of it afterwards, consequently, can not be the criterion: if it were, a temporary suspension of execution by a statutory provision, such as with us ensues a judgment on special verdict, demurrer, or case stated, in order to give time for a writ of error, would have the effect of working a dissolution of the recognizance, which it never was intended or supposed to have. A writ of error which supersedes execution, undoubtedly discharges the special bail, because the bail in error is substituted for them, and a new security is interposed; but if a writ of error be not taken, or bail in error be not given, the special bail remain liable; and why should a suspension of the act of a party be more extensive in its effect?

If a limited stay of execution implied an exemption of the

person at the expiration of it, it would certainly make the defendant a freeman; but it is one thing to postpone the time of satisfaction, and another to narrow the means of it. When the stay is out, the plaintiff has the same right to execution of the body that he had before, or that he would have had if there had been no stay at all; and if a suspension of the right to immediate execution be not necessarily a relinquishment of the security originally taken to have the body forthcoming, when execution of it should be legally demanded, it produces no intermission of the plaintiff's power over it in the mean time. During a postponement of execution, the power of the bail, incidental to a continuance of their responsibility, is as much the power of the plaintiff as it was before judgment; nor is it more remotely so in respect to his means of compelling them to use it by an execution against the body. In the event of the defendant's succession to a seat in parliament, or of his transportation, banishment, or death, the power both of the plaintiff and the bail is displaced by a superior power, which essentially differs the case from that of a mere suspension of the plaintiff's right to insist on the immediate exercise of a power transferred from him to the bail, and continuing to exist in them with all its original force. It would be unreasonable to interpret the agreement for a stay so as to subject the plaintiff to the risk of the defendant's evasion, unless the latter could have no benefit of it in another way. Not only, however, is his property temporarily exempt from seizure, but the custody of his person is committed to the discretionary authority of a friend, whose object in acquiring it is to set him at liberty instead of letting him remain in jail, under the arbitrary power of the plaintiff. He may, doubtless, be deprived of the expected benefit by the capricious surrender of his friend; but to be subject to the power of a keeper of his own choice was the whole consideration of his *cognovit*, and if he meant to stipulate for the permanent exemption of his person, he ought to have had it so expressed. At the worst, he has the benefit of a temporary exemption of his property, which is a sufficient consideration. Having obtained everything that he stipulated for, it does not follow that he would be discharged if surrendered; and it therefore seems that the opposite doctrine is without foundation even in technical reason. But, however the question might be thought to stand on theory or foreign authority, it is sufficient for present purposes that no counsel in Pennsylvania ever suspected a temporary stay of execution to be an exonera-



tion of special bail, and that the practice has been settled from the first, in conformity with the principle now indicated. It would seem, therefore, that the plaintiff was entitled to judgment.

Judgment affirmed.

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## HARPER v. BLEAN.

[3 WATTS, 471.]

A DEVISE BY WHICH A TESTATOR DEVISES TO HIS WIFE certain real property, describing it, together with certain personal property, and also, "with whatsoever is not named that I have any right or claim to, either in law or equity," vests in her, not only a life estate, but the reversion in fee to said real property.

ERROR to the common pleas of Cumberland county. The facts are stated in the opinion.

*Biddle and Penrose*, for the plaintiff in error.

*Carothers*, contra.

By Court, SERGEANT, J. The testator, by a will in his own handwriting, devised to his wife the farm, fulling-mill, and carding machines, on which he was then living: he next bequeathed to her all his personal property; and then two lots of ground, describing them. Immediately afterwards, by a sweeping clause, he gives to her "all his cash, notes, and book accounts, with whatsoever is not named that he has any right or claim to, either in law or equity;" and ends by appointing an executor. He had no other real estate than that described in the will. He had no issue, but left his wife surviving. He left also brothers and sisters, in whose right the plaintiff claims in this ejectment. And the question is, whether the reversion in fee of the farm and fulling-mill passed to the widow, who is since deceased, her title being vested in the defendant.

Under decisions which can not now be judicially departed from, however often regretted by enlightened judges as defeating the intention of the testator, the first devise to the wife, being by words which denote the locality of the property, and not the quantity of interest, conveyed only a life estate. But that the last devising clause was thrown in for the express purpose of comprehending everything which he might previously have omitted, and with the design of making his wife universal devisee and legatee of all that he owned or possessed, I think is apparent; and in the construction of wills, the intent

of the testator is to be carried into effect if no rule of law be thereby infringed. It is objected, that by the bequest of whatsoever was not named that he had any right or claim to, either in law or equity, only things *ejusdem generis* as those previously mentioned, that is, cash, notes, or book accounts, passed, and that this clause can not be extended to real estate.

But artificial rules for the interpretation of deeds, contracts, and other deliberate instruments, are not applicable to the construction of wills. They never have been so considered at any period of the law. On the contrary, many constructions have been given to words in a will in order to effectuate the intention of the testator, which would not have been permitted in a deed; and the same words have received different constructions: Cowp. 299, Co. Lit. 204 a. In ancient times, if a man devised lands to another *in perpetuum*, or to give and to sell, or in *feodo simplici*, or to him and his assigns forever: in those cases, says Lord Coke, a fee simple passed by the intent of the deviser: Co. Lit. 96. Yet these words would not have been sufficient in deeds. In modern times, words not appropriated to real estate, such as property, interest, effects, and even legacy, have been adjudged sufficient. Another answer to this objection is, that it would render the residuary clause in this will nugatory. For the testator had previously given to his wife "all his personal property," which conveyed all his personal estate of every description, whether consisting of choses in action or in possession. It is, therefore, absolutely necessary, if the residuary clause is to have any operation at all, to refer it to the reversionary interest in his real estate previously devised to his wife, which was the only interest he had of any sort, either real or personal, not previously devised or bequeathed, or, as he terms it, "not named." His having before given her an estate for life, in his real estate, is no objection to this construction of the clause. It would be going a great way, says Lord Mansfield, Cowp. 308, to lay it down as a general rule, that when a particular estate is given to a person in one part of the will; and the testator afterwards devises to him in more general terms, he shall not reap any benefit from the devise. In that case, *Hogan v. Jackson*, Id. 299, testator gave to his mother his home and lands of G., during her natural life, and, after several legacies to others, devised to his mother all the remainder and residue of his effects, both real and personal, which he should die possessed of. It was held that the mother, by the residuary clause, took a fee in the real

estate of G. *Chester v. Chester*, 3 P. Wms. 56, is a case strongly resembling, in this point, the present. A., on the marriage of his son B., settled part of his lands on B. in tail, and being seised in fee of the reversion of these lands and of other lands in possession, devised all his lands and hereditaments, not otherwise settled or disposed of, and it was held the reversion passed. In *Ridout v. Pain*, 3 Atk. 488, testator gave his wife an estate for life in part of his real estate, and afterwards bequeathed her the residue, etc. Lord Hardwicke held the residuary clause carried the inheritance; which was affirmed on error.

Then if a previous devise for life to the object of the testator's bounty does not prevent the devisee from acquiring, by a residuary bequest, the reversion in fee of the same estate, the next question is, whether a bequest of "whatsoever I have any right or claim to in law or equity," will not pass a reversion in real estate, where such appears to be the intent of the devisor. These words are of a comprehensive description, embracing everything in respect to which ownership may exist, whether real, personal, or mixed. They are quite as appropriate to real as to personal property. They are the common terms employed in conveyances of land. If the words, effects, legacy, have been held sufficient to pass real estate, as in *Hogan v. Jackson*, Cowp. 299; *Hope d. Brown v. Taylor*, 1 Burr. 270; surely the words, "whatsoever I have any right or claim to," are much more efficacious. In *Grayson v. Atkinson*, 1 Wils. 333, a devise of all the rest of my goods and chattels, real and personal, movable and immovable, in houses, gardens, tenements (without making use of the word estate, or any words of limitation), were held to give a fee. In *Tilley v. Simpson*, decided in 1746, cited 2 T. R. 659, testator devised lands to several persons, and all the rest and residue of his money, goods, chattels, and estate whatsoever, to his nephew B. The question was, whether a beneficial interest in a real estate, not before disposed of, would pass to the nephew by the devise. Lord Hardwicke held it would. He said that where the court had restrained the word estate to carry personal estate only, it had been where it appeared it was the intention of the testator it should be so understood, as where it stood coupled with particular descriptions of parts of the personal estate, as a bequest of all my mortgages, household goods, and estate, in which the preceding words are not a full description of the personal estate. Therefore, when he has used words comprehending all his personal estate, that word will carry a

real estate. The word whatsoever is used here, which is the same as if he had said, of whatever kind it be: and if that had been the case, it would most certainly have carried the real estate.

The remarks of Lord Hardwicke apply in a very peculiar manner to the devise now in question: the testator, Harper, having employed language as full and comprehensive as that which he says would most certainly carry real estate; and moreover, the preceding bequest of "all his personal property" is a full description of the personal estate, and therefore the last clause is not to be restrained to personal estate. So in *Terrel v. Page*, 1 Ch. Cas. 262, where there was a devise of all the rest and residue of my money, goods, and chattels, and other estate, the same determination was made. It is true, that in some of the cases, there have been introductory words which are wanting here; but on investigation it will be found that their influence on devises has not been sufficient to extend the construction when the devising part would not justify it, and it is probable the same construction would now be given without, that has been made with them: See 2 Preston on Est. 206. Nor is this rule of construction, that the language must be subordinate to the plain intent of the party, now confined to wills. In *McWilliams v. Martin*, 12 Serg. & R. 269 [14 Am. Dec. 688], an assignment of all debts, dues, or demands, whatsoever or wheresoever, real, personal, or mixed, due or owing, or of right belonging to the assignor, by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, or which thereafter might become due, were held to pass real estate.

Judgment affirmed.

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Approved in *Brown v. Boyd*, 9 Watts, 129; *Schriner v. Meyer*, 19 Pa. St. 89; and *Geyer v. Wentzel*, 68 Id. 88.

CASES  
IN THE  
COURT OF APPEALS  
OF  
SOUTH CAROLINA.

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STATE v. DE WITT AND WATTS.

[2 HILL, 282.]

**EVIDENCE OF WHAT A DECEASED WITNESS testified upon a former trial, is admissible upon a second trial of the case.**

**THE NOTES OF THE PRESIDING JUDGE in relation to what such witness said, are not *per se* evidence.**

**ACTS OF CONSPIRACY ARE INDICTABLE, if their tendency be to corrupt or pervert the course of justice, in a civil or criminal proceeding, the definition including attempts to fabricate or destroy evidence, to be used in such proceedings.**

INDICTMENT for a conspiracy to defraud the devisees of Christopher Watts, deceased, by destroying the last will and testament of said Watts. Defendants, who were son and son-in-law of said Watts, had, immediately after his death, gone to the house of a son in whose possession the will was, and had then either destroyed or secreted it. At a former trial of the case, it was withdrawn from the consideration of the jury, after only part of the evidence had been given. Hartley, one of the witnesses then examined, died before the present trial. Evidence of what he had testified was admitted. Defendants were convicted. They moved for a new trial because it was error to have admitted evidence of what Hartley testified at the former trial. In arrest of judgment they insisted: 1. The offense of conspiracy does not exist within this state. 2. If the existence of the offense be admitted, yet the acts charged do not come within its definition.

*Wilson and Whitaker, for the defendants.*

By Court, JOHNSON, J. We concur with the presiding judge, that the evidence of Harvey as to what Hartley swore on the former trial, was admissible in evidence. The rule that what a deceased witness has sworn on a former trial of the same case between the same parties may be received in evidence on a second trial, is a very familiar one, and of almost daily application. Neither the notes of the presiding judge, nor of the attorney-general, nor any one else, of the evidence given on the former trial, are of themselves evidence. I know they are frequently resorted to, and received by courtesy, but we know that they are frequently taken very loosely, indicating only the conclusions of fact drawn by the judge from the circumstances stated, and without the expectation of their ever being used for any other purpose than to refresh his memory in summing up to the jury, or reporting the case; and it would be of mischievous tendency to regard them as evidence, for if they were, being in writing, they would be conclusive. The proof here, then, was the only legal proof, that of a witness sworn to testify *viva voce* what was stated by the deceased witness. The circumstance that a juror was withdrawn on the first trial, and no verdict found, can not vary the question, for the evidence derives its weight alone from the circumstance that it was given on oath, when the parties had an opportunity of examining and cross-examining the witness.

The motion in arrest of judgment involves a question of much greater difficulty and importance. It admits that the defendants conspired together to destroy the last will and testament of Christopher Watts, with the intent to defraud the devisees and legatees under that will; and the question is, whether that is an offense punishable by indictment.

The statute of 33 Edw. I., which is of force in this state, would seem to have been intended to define the offense of conspiracy, and limit it to such as confederated together, falsely and maliciously, to indict or move and maintain pleas against others, or who undertake to hear or maintain quarrels, pleas, or debates, that concern other parties. But the authorities all agree that this statute is declaratory of the common law, and that other acts, not therein enumerated, constituted conspiracy, and are indictable at the common law: and Sergeant Hawkins says, that all conspiracies whatsoever, wrongfully, to prejudice a third person, are highly criminal at the common law: and the examples which he puts, are where divers persons confederate together, by indirect means to impoverish a third person; or

falsely and maliciously to charge a man with being the father of a bastard child; or to maintain one another in any matter, whether it be true or false: Hawk. P. C., b. 1, c. 72, sec. 2.

This definition is exceedingly broad, and would seem to include every combination to do wrong to another by any possible means; but that it ought not to be so understood, we have the authority of some of the most eminent judges of the English bench, as I shall hereafter have occasion to show; and the great difficulty lies in determining the precise boundary between the class of injuries against individuals for which a prosecution for a conspiracy will or will not lie; and I confess that I find great difficulty in reconciling the authorities on this question to any definite principle.

In regard to the public, all agree that a combination to do a public mischief, is indictable. As to endanger the public health by vending unwholesome provisions; to raise the price of public funds by false rumors or other unlawful means. To manufacture, for sale at vendue, a base article, so nearly resembling that which is genuine and valuable, as to be calculated to deceive the public, is a combination amongst a class of laborers to raise their wages by unlawful means. So of a conspiracy to defraud the revenue: *Mawbey's case*, 6 T. R. 619; *McCarty's case*, 2 Ld. Raym. 1179; *De Berenger's case*, 3 Mau. & Sel. 67; *Judd's case*, 2 Mass. 329 [3 Am. Dec. 54]; and in *Hever's case*, 2 East P. C. 858, note.

A conspiracy to make a fraudulent acceptance of a bill of exchange, and uttering the same as true, with the intent fraudulently to obtain goods upon the faith thereof, was held to be indictable as a conspiracy, obviously upon the ground that a bill of exchange, when accepted, is a *quasi* currency, and calculated to impose on the community, and therefore, a fraud affecting the public. It would seem, indeed, that the rule was universal, that all conspiracies to impose on or injure the public, are indictable: *Vide* Hawk. P. C., b. 1, c. 72; 2 Russ. 1800.

In respect to conspiracies affecting individuals, the text of Hawkins, when understood in its largest sense, is rather too broad. It can not be true that every combination wrongfully to injure a third person is indictable as a conspiracy, for the withholding a just debt, the commission of an ordinary trespass, and every cause for which an action would lie, is a wrong and an injury. In *Turner's case*, it was held that an indictment would not lie for a conspiracy to commit a civil trespass by hunting on one's ground, and in that case Lord Ellenborough

intimates pretty clearly that the doctrine of conspiracy had been carried quite as far as there was any warrant to be found for it in the law; and the same learned judge held, in *Pyrul's case*, 1 Stark. 402, that an indictment could not be maintained for a conspiracy to commit a fraud in the sale of an unsound horse.

The cases referred to in the text, are *Alderman Sterling's case*, 1 Lev. 125, 126, which is also reported in 1 Sid. 174, and *Tymberly's case*, 1 Keb. 254. *Sterling's case* was founded upon a conspiracy amongst the brewers of London, to excite the common people to pull down the excise house, whereby the excisemen would be impoverished, and rendered unable to pay the king's revenue; and the judgment of the court proceeded upon the ground, that it was calculated to injure the king's revenue, whereby the public were injured. *Tymberly's case* was for a conspiracy to charge one with being the father of a bastard child, with an intent thereby to extort money from him; and the judgment of the court proceeds on the ground that the tendency of the conspiracy was to disgrace the prosecutor, to charge him for the maintenance of the bastard, and to subject him to corporal punishment. When the principle comes to be fully developed, which has been contended for, I think it will be found that an indictment for a conspiracy will not in general lie in those cases of fraud or trespass not affecting the person, for which an action or suit at law would afford adequate relief, if the intention of the conspirators was consummated when the means intended to be resorted to are private.

But all conspiracies to injure others by perverting, obstructing, or defeating the course of public justice, whether in a course of criminal or civil proceeding, are indictable: Co. Lit. 161, 166, note 13, and it is against this class of cases that the statute of 33 Ed. I., seems to have been principally directed. Thus are all conspiracies to make false and malicious charges of a criminal nature, against another, to prevent the course of justice by procuring a false certificate that a highway was out of repair: Russ. on Crimes, 1800, 1804. In *Taylor's and Robinson's case*, 2 East P. C. 1010; 1 Leach, 37, it was held that where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a spurious title to the property of the master after his death, the offense was indictable; and it seems to have been taken for granted, for



the only ground of objection, was that the injury was not consummated.

The principle on which this case proceeds is, that it was an attempt to fabricate evidence, and holds out a false coloring, in order to prevent the course of public justice; not that in itself the act so operated, but that it was intended so to operate; and in this respect it bears, I think, a strong analogy to the case under consideration. Here the act done was not, it is true, intended to fabricate evidence to deceive, but to destroy it for the purpose of deceiving, in a court of justice. The testator's will constituted the only evidence of the disposition he had made of his estate after his death, with a view of substituting it for the disposition which the law makes, and that through the agency of a court of justice. The act charged had for its object the perversion of justice, and was as well calculated to produce that result as the fabrication of evidence; and if the case of Taylor and Robinson be law, this prosecution is well supported.

Upon the first view of that case, I confess I was disposed to think that its correctness was questionable, and I felt myself also much embarrassed by *Charles Miller's case*, which came before this court in Columbia, in May, 1828. There, several had conspired to obtain a promissory note from the prosecutrix, a woman, and to seduce her to go out of the neighborhood in which she lived, under the pretense that one of them would marry her, and thereby to furnish them with a pretext for levying an attachment on her property; and which was accordingly done, and it was held that an indictment for a conspiracy would not lie.

But I well recollect that the resolution of the court was pronounced with great hesitation, and much doubt as to its correctness, and I have used this occasion to investigate the question more fully, and am satisfied that it was wrong.

Attempts to suborn a witness to commit perjury or to prevent his giving evidence, are offenses against public justice; and there can be no well founded reason why the fabrication of evidence not involving perjury, or the destruction and suppression of that which is good, should not equally be so; they are alike calculated to pervert the public justice of the country; and to do individual injustice.

I am of opinion, therefore, that this motion must be refused, and it is so ordered.

O'NEALL and HARPER, JJ., concurred.

WHAT ACTS OF CONSPIRACY ARE INDICTABLE.—This subject is treated exhaustively in *State v. Buchanan*, 9 Am. Dec. 534; other cases are *Commonwealth v. Judd*, 3 Id. 54; *Commonwealth v. McKisson*, 11 Id. 630; *State v. Younger*, 17 Id. 531; *People v. Mather*, 21 Id. 122.

EVIDENCE OF WHAT A WITNESS SAID ON A FORMER TRIAL is admissible, when: *Magill v. Kauffman*, 8 Id. 713 and note; *Drayton v. Wells*, 9 Id. 718.

## STATE v. BOYD.

[2 HILL, 288.]

THE WIFE IS A COMPETENT WITNESS AGAINST THE HUSBAND, on his trial for a personal outrage committed by him upon her.

AN INDICTMENT WILL NOT BE QUASHED because of the character of the evidence which has influenced the grand jury in finding it.

MOTION to quash an indictment against defendant for assaulting and beating his wife. It appeared, from the affidavit of a member of the grand jury that found the indictment, that the wife and other witnesses, upon whose evidence the indictment was found, were not examined *viva voce*, but their written statements were accepted. It was upon this, and upon the additional ground, that his wife had been allowed to testify before the grand jury, that defendant relied in support of his motion. The motion was denied, and defendant was convicted. Defendant appealed.

*Treville*, for the appellant.

*Smith*, attorney-general, contra.

HARPER, J. The first ground of the motion seems not to have been seriously relied on. Since *Lord Audley's case* it seems to have been held that the wife may be a witness against her husband, on a prosecution for a personal outrage committed against herself. Such was the decision in *Rex v. Aire*, 1 Str. 633, a case of assault and battery. Justice Buller examines the subject, and expresses that opinion in his *Nisi Prius*, 287.

With respect to the second ground, I am of opinion that the court will, in no instance, inquire into the character of the testimony which has influenced the grand jury in finding an indictment, with a view to the quashing of the indictment. The court will not, to be sure, send incompetent evidence to a grand jury; and this is the purport of the authority relied on, *Denby's case*, Leach, 518, where the court refused to send to the grand jury the depositions of a witness, who had been sworn, and was before them. When it is said by Blackstone, 4 Com

303, that the grand jury should not rest satisfied with probabilities, but require the best evidence in their power, this is plainly only matter of advice to the jury.

In Jacob's Law Dictionary, tit. Indictments, it is said that, "though a bill of indictment may be brought unto them without oath made, they may find the bill if they see cause, but it is not usual to prefer a bill unto them, before oath be first made in court that the evidence they are to give unto the grand inquest, to prove the bill, is true," quoting 2 Lil. Abr. 44. If they may find without evidence, it can hardly vitiate their finding that they receive evidence not competent. The nature of the grand juror's oath sufficiently indicates that they are not to communicate to others that which passes among the jurymen in their consultation, and I think the juror who made the affidavit in the present instance was guilty of a violation of duty. Suppose a jurymen to communicate to his fellows a rumor he has heard bearing on the charge in the indictment; is the court to investigate that matter and quash the indictment for that cause?

There is something ambiguous in the affidavit. I should infer from it that the witnesses were sworn, and were before the grand jury, but that instead of examining them *viva voce*, they received their written statement of the facts they were prepared to testify. This could hardly be called a statement without oath, it was delivered under the sanction of the oath they had taken.

The motion is dismissed.

O'NEALL, J., concurred.

JOHNSON, J., absent.

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**MARRIED PERSONS ADMITTED TO TESTIFY TO MATTERS CRIMINATING EACH OTHER WHEN.**—At common law husband and wife are mutually incompetent to testify in proceedings, civil or criminal, to which the other is party, or in which that other is interested. In common with all other rules of law, this rule can bend where the exigencies of the situation are of that character that its enforcement would thwart the ends of justice. Obviously demanding a relaxation of the rule for that reason is the case of a prosecution for personal injury committed by the one spouse upon the other. The need was long since seen, and was answered as early as the year 1631, when, upon Lord Audley's trial for assisting in and procuring a rape upon the person of his wife, it was resolved that the wife might testify in regard to the rape: "For she was the party wronged, otherwise she might be abused. In like manner, a villein (vassal) might be a witness against his lord in such cases." 3 Howell's St. Trials, 402. Notwithstanding the strength with which this decision appeals to our sense of justice, it was for some time doubted: See *Mary Gregg's case*, T. Raym. 1; Bull. N. P. 236.

These doubts have been very long dispelled, as will abundantly appear from the cases cited below: *People v. Fitzpatrick*, 5 Park. Crim. 26; *Soule's case*, 5 Greenl. 407; *United States v. Fitton*, 4 Cranch C. Ct. 658; *United States v. Smallwood*, 5 Id. 35; *State v. Davis*, 3 Brev. 7; *State v. Borden*, 6 R. L. 495; *People v. Carpenter*, 9 Barb. 580; *People v. Northrup*, 50 Id. 147; *Agire's case*, 1 Str. 633; *Commonwealth v. Reid*, 8 Phila. 385; *People v. Mercein*, 8 Paige, 47. A rule prevails that wherever the wife is competent against, she is also for the husband, and therefore, may be called as a witness for the husband held upon a charge of violence committed upon her: *Rex v. Sergeant*, Russ. & M. 352; *State v. Neill*, 6 Ala. 686; *Commonwealth v. Murphy*, 4 Allen, 491; *People v. Fitzpatrick*, 5 Park. Crim. 26. The cases generally instance acts of violence committed by husband upon wife, but should the wife choose to assault the husband, he is a competent witness against her: *Whipp v. State*, 34 Ohio St. 87; *State v. Davidson*, 77 N. C. 522. This exception to the general rule of incompetency of husband and wife, warrants the introduction against the husband on trial for the murder of his wife, of her dying declaration: *Woodcock's case*, 1 Leach C. C. 500; *Pennsylvania v. Stoops*, Add. 282.

In North Carolina, the scope of this exception has been somewhat limited, for her courts have held that the wife is not a competent witness to prove a battery committed by her husband upon her, unless thereby there is inflicted upon her lasting injury, or such injury is threatened. "It is not denied that the wife may exhibit articles of the peace against her husband, and that from a particular necessity, no one else can take the necessary oath; but the question here is, can she be called to testify against him for an ordinary assault and battery upon her? And by ordinary is meant a battery which neither threatened her life, nor any great bodily harm. Mr. Greenleaf, vol. 1, sec. 343, in enumerating the cases in which a wife may be examined as a witness, states some which are for felonies, or acts leading to felonies, and refers to one for assault and battery on her. For this he refers to *Agire's case*, 1 Str. 633, where it is reported in about as many words as Mr. Greenleaf has used in stating the principle. Nothing is said of the facts or the nature and extent of the assault and battery, and for it, is only cited *Lord Audley's case*, which was for an atrocious felony upon her person. Now it is utterly impossible that the principle can be true, as stated. We know that a slap on the cheek, let it be as light as it may, indeed, any touching of the person of another in a rude or angry manner, is in law an assault and battery. In the nature of things, it can not apply to persons in the marriage state; it would break down the great principles of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign." *State v. Hussey*, Busb. 126; *State v. Rhodes*, Phil. L. (N. C.) 453; *State v. Davidson*, 77 N. C. 522. Husbands have been prosecuted elsewhere for assault and battery upon their wives, and the latter have been uniformly admitted either for or against the prisoner, without such distinction having ever been taken: *United States v. Fitton*, 4 Cranch, C. Ct. 658; *United States v. Smallwood*, 5 Id. 35; *State v. Neill*, 6 Ala. 585; *Commonwealth v. Murphy*, 4 Allen, 491; *State v. Davis*, 3 Brev. 7. It is therefore probable that the distinction is peculiar to North Carolina.

The exception above discussed is evidently meant in great part, if not entirely, to afford the wife a shield wherewith to protect herself against a brutal husband, and therefore a legitimate conclusion from it would be, that the wife should be a competent witness against her husband, held for conspiracy to do her unlawful harm; but it has been held otherwise; thus the

wife is not competent, upon the trial of her husband on a charge of conspiracy, to fasten upon her the offense of adultery: *State v. Burlingham*, 15 Me. 104. Nor is she competent, where the husband is held for using criminal means, such as subornation of perjury, for the purpose of injuring her in a judicial proceeding: *People v. Carpenter*, 9 Barb. 580.

A wife's oath will not support a warrant for the arrest of the husband on a charge of adultery: *Commonwealth v. Jailer*, 1 Grant's Cas. 218.

In Iowa, however, adultery of one of the spouses is considered a crime against the other, for a statute enacting that, "the wife or husband shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by the one against the other," was construed as rendering the husband competent on the trial of his wife for adultery: *State v. Bennett*, 31 Iowa, 24.

It is somewhat uncertain whether a married person is disqualified from testifying by the fact that his or her husband or wife is a party to the record, if, from the circumstances of the case, it is impossible that his or her testimony may affect the interests of the other spouse, whether favorably or injuriously. The following might be the case: A, B, and C. are jointly indicted for murder, but sever in their pleas; on the trial of A, he calls the wife of B. to prove some fact which would be material to his interests, but can not affect those of B. Mr. Greenleaf says of this case: "Where the grounds of defense are several and distinct, and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another." Greenl. on Ev., sec. 335.

This proposition is maintained by the majority of the cases: *Thompson v. Commonwealth*, 1 Metc. (Ky.) 17; *Cornelius v. Commonwealth*, 3 Id. 481; *Commonwealth v. Manson*, 2 Ashm. 31; *State v. Waterman*, 1 Nev. 543; *State v. Burnside*, 37 Mo. 343; *Moffit v. State*, 2 Humph. 99; *Workman v. State*, 4 Sneed, 425; *State v. Anthony*, 1 McC. 285; *State v. Drawdy*, 14 Rich. (S. C.) 88.

Upon the other hand, it is said that a wife is competent to testify in a suit to which her husband is a party to the record, only in those cases in which the husband himself would be allowed to be a witness, and that when to this is brought the further rule that a party to a criminal proceeding is not a competent witness for a co-defendant, though their trials be separate, the incompetency of the wife will clearly appear: *State v. Smith*, 2 Ired. 402; *United States v. Wade*, 2 Cranch C. Ct. 680; *Pullen v. People*, 1 Doug. (Mich.) 48. In *Commonwealth v. Reid*, 8 Phila. 396, the conclusion is arrived at that, though a wife might be rendered incompetent, by the joint operation of these rules, as a witness for a co-defendant upon his separate trial, yet they would not operate to render her incompetent to testifying in favor of the state.

It is certain, however, that if the defendants do not sever in their defense, or if the offense charged to them be of a kind that the guilt or innocence of the defendants is mutually dependent, as in cases of conspiracy, riot, etc., the wife or husband of the one defendant will not be competent for any of the defendants: *Commonwealth v. Eastland*, 1 Mass. 15; *Commonwealth v. Robinson*, 1 Gray, 55; *Mask v. State*, 32 Miss. 405.

It is also a mooted question whether, in collateral proceedings, the wife or husband may be heard to testify with regard to matters that would tend to criminate the other party to the marriage relation.

*Rez v. Cliviger*, 2 T. R. 263, was a case respecting the settlement of a pauper; there, after a marriage in fact between two paupers had been proved, the first wife of the male pauper was called in to prove her prior marriage.

Here, of course, as the husband was not a party to the proceeding, his interests could not be affected by any determination of the suit, nor could the evidence of his wife be made to operate in any directly injurious manner to him; yet the wife was held incompetent. Ashurst, J. said: "But the ground of her incompetency arises from a ground of public policy which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not merely confined to cases where the husband and wife are directly accused of any crime; but even in collateral cases, if their evidence tends that way, it should not be received."

The case has been overruled in England: *Rex v. Bathwick*, 2 Barn. & Adol. 639; *Rex v. All Saints*, 6 Mau. & Sel. 194; *Rex v. Halliday*, 8 Cox, C. C. 298; and to some extent in this country: *Commonwealth v. Reid*, 8 Phila. 389; *State v. Buggs*, 9 R. I. 361; *State v. Marvin*, 35 N. H. 22.

But more frequently it has been followed. Thus it is matter of frequent determination in this country, that upon an indictment of one for adultery with a wife, though the wife is not also jointly indicted, yet the husband will be an incompetent witness for the state, for it is said that he should not be heard "because the evident effect of his testimony is to affect the marital relations." *Commonwealth v. Gordon*, 2 Brewst. 569; *State v. Welsh*, 26 Me. 30; *Commonwealth v. Sparks*, 7 Allen, 534; *State v. Gardner*, 1 Root, 485; *State v. Pettaway*, 3 Hawks, 623.

One case has gone so far as to decide that even after removal of a wife jointly indicted from the record by acquittal, her husband will not be allowed to testify, as against the other defendant, as to matters that would have a tendency to criminate her, though of course she had been removed from the reach of punishment by her acquittal: *State v. Wilson*, 31 N. J. 77.

It is possible that some of these cases may have lost sight of the distinction between grounds of incompetency and matters that merely raise a proper case for demanding the privilege of a refusal to answer. It seems that the ends of justice would be sufficiently answered by giving to the wife or husband questioned as to matters that would tend to criminate the other, a right to decline an answer in the same manner that it would be accorded to that other, were he or she, instead of the husband or wife, the witness examined.

Where neither husband nor wife is a party interested, they will be allowed to testify, though their testimony clashes; provided the evidence of neither charges to the other an indictable offense: *Commonwealth v. Patterson*, 8 Phila. 609; and indeed, one of the married persons will be allowed to give evidence, the only tendency whereof is to discredit the other: *Ware v. State*, 55 N. J. 553; *Cornelius v. State*, 12 Ark. 782; but this is sometimes held differently: *Roach v. State*, 41 Tex. 261. An accomplice may be corroborated by his wife: *State v. Moore*, 25 Iowa, 128; *Haskins v. People*, 16 N. Y. 344.

In prosecutions for bigamy, the rule of exclusion seems involved in doubt. The nature of the subject affords great room for casuistry. The distinction between that evidence which goes to the competency of the witness, and of that which applies to the issues before the jury, is here all-important, but at the same time is one that easily escapes detection. The case of the *United States v. Miles*, 23 Alb. L. J. 326, is well illustrative of this. This was a prosecution for bigamy; the fact of a marriage between defendant and Caroline Owens was admitted, but the existence of a prior marriage between defendant and Emily Spencer was contested; whereupon Caroline Owens was admitted to give evidence against defendant, touching his marriage with Emily Spencer, and the jury was charged that they might consider her testimony, if from all the evidence in the case they found that she was a second or plural wife. This was held by the supreme court of the United States error.

The error consisted in this, that as a marriage between witness and defendant had been proved, it followed that she was *prima facie* incompetent, and to render her competent it must be proved that she was not a wife: this, in this case could be done by establishing the first marriage by other evidence; and when this was once done, the second wife would be admitted to prove the second marriage, but not the first, for if this were allowed, the case would be that a person *prima facie* incompetent had been allowed to testify, not only to the facts of the case, but also as to the existence of matters which rendered her competent. In other words, the burden of passing upon the competency of a witness would have been shifted from court to jury.

In the same way, when the first marriage was contested, but the second admitted, it might be claimed that the first wife was a competent witness, for if defendant objected to her, upon the ground of incompetency, it could be said that he admitted witness to be his wife, and his guilt would necessarily stand proved; but if grounds of incompetency are to be tried by the court, it does not appear how this consequence would follow. Moreover, the authority of *Mary Gregg's case*, T. Raym. 1, is opposed to this view, for there the guilt of the prisoner depended upon the fact, whether she had or not been married previously to a marriage already established. To prove the fact of the first marriage, the reputed first husband was called, but he was rejected upon the ground that a husband was incompetent to testify against his wife, and the prisoner was acquitted, there being no other witnesses to the existence of the first marriage; but it is evident that had an objection to the witness sufficed to establish the existence of the first marriage, the prisoner could never have been acquitted on account of failure of proof as to that fact: See also remarks of Mr. Wharton in his Criminal Evidence, sec. 397. In Canada, it has been ruled, that on an indictment for bigamy, the first wife is inadmissible to prove in favor of defendant that their marriage was invalid. *Rex v. Madden*, 14 Up. Can. Q. B. 588. The ruling seems entirely indefensible, for if the marriage was invalid, then no ground of incompetency exists which can bar the evidence of the woman; therefore, a rejection of the witness would prejudice one of the material facts of the case.

After a first marriage is proved, the second wife is competent to testify, as to all matters material to the prosecution, other than as to the existence of the first marriage, this reservation being made for reasons set out before; *United States v. Miles*, 23 Alb. L. J. 326; *Rex v. Sergeant*, Russ. & M. 354; *State v. Patterson*, 2 Ired. 346; *Finney v. State*, 3 Head, 544; *State v. Johnson*, 12 Minn. 476.

Whether a wife may testify against her husband, held for high treason, is doubtful. There is a *dictum* to the effect that she can in *Mary Gregg's case*: T. Raym. 1; but it does not seem to have met the approval of text-writers. See Greenl. on Ev. sec. 345; Phill. on Ev. 71.

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## LONGWORTH v. SCREVEN.

[2 HILL, 298.]

THE ADVANTAGES OF AN AUDITA QUERELA may all be obtained by motion, under the modern practice.

AN AUDITA QUERELA is a proceeding to prevent, recall, avoid, or set aside an execution, founded upon matters arising subsequent to the judgment, which, therefore, the party had not opportunity to plead.

AN AUDITA QUERELA WILL NOT LIE, at the instance of one not a party to the judgment, to set aside a levy and sale upon the ground that, though the property sold was covered by the judgment lien, yet that at the time it belonged to the petitioner, and there was, as known to the sheriff and purchaser at the sale, ample property belonging to the judgment debtor which might have been sold in satisfaction of the judgment.

MOTION by Besselen to set aside a levy and sale, under execution issued, in the above action. A tract of land purchased by Besselen from the defendant, subject to the judgment lien of plaintiff, had been sold at this sale. Besselen alleged that at the time there was ample property of the defendant that might have been applied in satisfaction, and that this was known at the time to the purchaser at the sale and the sheriff. The petitioner claimed that this relief would have been granted under the ancient writ of *audita querela*, and that the purposes of this writ could be answered by motion. The motion was denied. Petitioner appealed.

*Pettigru*, for the motion.

*Mazyck*, contra.

By Court, EARLE, J. (sitting for Mr. Justice Harper). The mode of proceeding by writ of *audita querela*, has never been used in this state, at least, never used technically and according to the precedents. It is occasionally resorted to, as a common law remedy, in several of the states, in Massachusetts, New York, and Maryland; as late as 1810 in Massachusetts, and 1820 in New York: 10 Mass. 101; 17 Johns. 484. It is of rare occurrence, however, either in England or in this country. The indulgence of the courts, in granting summary relief upon motion, in all cases of evident injustice, illegality, and oppression, has rendered useless the writ of *audita querela*, and driven it out of practice; and the modern course of proceeding, both in England and in this state, is to interpose in a summary way, in all cases where the party would be entitled to relief on *audita querela*: 3 Bl. Com. 403; 1 Bos. & Pul. 428; 1 Salk. 93; 4 Johns. 190. Where the facts are doubtful, and the court should be unwilling or unable to decide them, an issue might be ordered, which I think has been the practice in this state; and then such an issue would become the substitute for the formal and technical writ of *audita querela*, and answer the same end. Or the party complaining might be put to that writ, as a common law mode of proceeding, which is a regular suit, where the parties may take issue in law or in fact, and a regular judgment



must be pronounced: 1 Mass. 101; 17 Johns. 484. I should be unwilling to say that it is so far obsolete that our courts would not allow it, if preferred.

The present motion is therefore considered as a substitute for the writ of *audita querela*, and as the opinion of the court has been formed upon the case made by the actor in the motion, the material facts of which are not controverted, its judgment will be pronounced as if they had been found by a jury, on an issue on *audita querela*. The question then is, whether the case made, if found on *audita querela*, would entitle the party complaining to the relief which he seeks. As the authorities mainly relied on by the counsel for the actor in the motion, were cases of *audita querela*, it may be well to ascertain what was the object and nature of that writ. "An *audita querela* is a writ to be delivered against an unjust judgment or execution, by setting it aside for some injustice of the party that obtained it, which could not be pleaded in bar to the action; for if it could be pleaded, it was the party's own fault, and therefore he shall not be relieved, that proceedings may not be endless:" 1 Bac. Abr. 307, *Aud. Quer.*

It is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter in discharge, which has happened since the judgment, where he hath good matter to plead and no opportunity to plead it: 3 Bl. Com. 403. "An *audita querela* to prevent or recall an execution, may be sustained upon some ground which occurred after the rendition of the judgment, so that the debtor had no opportunity to plead it or give it in evidence:" 12 Mass. 268; and so are all the authorities. It is a proceeding to prevent or recall, to avoid or set aside, an execution, upon matter subsequent, which, in law or equity, shows that it should not have been allowed, or that it is discharged, and that the party complaining is not liable; as where execution is sued out upon a statute before the time: 1 Boll. 120, 307. Or upon a statute taken without authority, or not duly sealed: Cro. Eliz. 233. So if a man pay a judgment and be afterwards taken in execution: 2 Cro. 29; or a party discharged under the insolvent act, after judgment may be relieved by *audita querela*: 4 Johns. 191. So if a man, being served with process, pay the debt on the promise of the plaintiff to discontinue, and he proceed to obtain judgment and execution: 1 Mass. 101. In all these cases, and in all that I can find, the execution is avoided or set aside. But the motion

now before the court is not to avoid or set aside the execution, which is admitted to have been regularly sued out upon a judgment which is yet in full force, and which is not alleged to be unjust, fraudulent, or unlawful. The motion is to set aside a levy and sale, made according to all the forms of law, of property which is admitted to have been bound by the judgment and liable to the execution. It is a motion to prescribe the mode of enforcing the execution, and to restrict the legal rights of the plaintiff according to a supposed principle of equity, admitting the ultimate liability of the property in question. It seems to me that there is no analogy between this and the cases of *audita querela* reported in the books; nor does it come within their principle. It is said if the conusor (in stat. mer. or staple) enfeoff several men of several parts of the land, and after, the conusee sues execution of the statute against one only, he shall have an *audita querela* upon this matter: 1 Bac. Abr., *Aud. quer.*, B; and so in 2 Id. 698, to the same effect, and more at length; and this is the authority mainly relied on. It might be enough to reply that the statutes of 13 Edw. I., c. 3, *De Mercatoribus*, and of 27 Edw. I., c. 9, stat. staple, were not expressly made of force in this state; and if they are so held by construction, those of 16 and 17 Car. II., c. 5, and 22 and 23 Car. II., c. 2, by which the right of the feoffee, in the cases supposed, is taken away, must also be regarded as of force, and then there is an end of the authority.

The process of extending lands upon the statutes merchant and staple in England, bears no resemblance to our sale on execution. There the execution was granted against the lands, goods, and chattels, and they were to be delivered to the conusee by a reasonable extent, till the debt be levied. A purchaser of part, after statute acknowledged, if the plaintiff sued out execution against him alone, might, by *audita querela*, set aside the execution, because it did not conform to the statute which required the execution to be extended on all the lands. And there was good reason for this, for if the whole were extended, the feoffee would be sooner reinstated in possession of his portion, as the debt would be sooner paid. It was error on the face of the execution. Besides, it was a continuing execution, not satisfied and extinct by delivery of the lands, but remaining open and operative until paid by the rents and profits. To produce any analogy, it must be supposed that the feoffee, after extent, should permit the plaintiff to remain in possession until his execution was satisfied, and then bring his *audita querela*. No such case can be found, nor can any case be found of relief by

*audita querela*, where the execution has been satisfied, paid off, or otherwise discharged by the party complaining. To render these cases analogous in another mode, let it be supposed that Screven, instead of one parcel, had aliened all his land, including the lots in Grahamville, to different feoffees; all being liable, the claim of the actor, Besseleu, to subject the other lands to levy and sale, would have been as strong as now. And yet I do not perceive how the plaintiff could have been controlled in his selection, or if he had sold Besseleu's first, how relief could have been granted. The judgment binds all, and binds equally. I can not understand degrees of more or less in a legal lien. The plaintiff can not sell all the lands, if one parcel will suffice; nor would it, in the case supposed, be the interest of one feoffee, that all should be sold, his own as well as the others, in order that the execution should be paid off, and the surplus be distributed, as it is in the case of the feoffee of the conusor on the stat. mer. and stap. that all the lands should be extended, in order that he might be the sooner reinstated. The plaintiff, therefore, would necessarily select the property he would sell, and it would be a singular application to the court of law, to prescribe the order in which he should sell; and it would be still more singular, after the sale of one parcel, to make a motion to set it aside, because he had not sold one instead of another, or because he had not sold the whole. I think it will be seen that there is no analogy, and that the supposed authority has no weight. Putting out of view the cases of *audita querela*, and considering this question by the rules which govern the court in granting summary relief on motion, is the actor in the motion entitled to the relief which he seeks, on the ground that the conduct of the sheriff and plaintiff was unlawful, or that there was partiality and injustice?

The cases of relief, either by *audita querela*, or on motion, have been before execution sued out, or before satisfaction while yet *in fieri*, and therefore within the control of the court from whence it issued. There have been instances of setting aside a levy and sale, too, for some manifest illegality, but I apprehend only at the application of the defendant or party to the record, and not at the instance of a third person, who only set up a claim to the property sold. In the case at bar, a regular and lawful execution was placed in the sheriff's hands; its mandate was to sell, and the sheriff has sold. The execution is no more; it is extinct, having performed its office. The sher-

iff has sold what he had a right to sell. The plaintiff had a right to his money, and he has received it; and the purchaser has acquired a legal and perfect title to the lands. It can never be allowed that all this shall be doné away, because Besseleu may have to sue Screven to recover back.

This is said not to be a case of contribution, but of exemption. But it is not. The party does not claim to exempt the land, but only to postpone its liability. Whatever may have been the result of such a motion, if made before sale, when no new rights had vested, nor old ones been extinguished, it is now too late. It becomes a question of compensation between him, the defendant, and the junior judgment creditors, at whose instance the sale is said to have been made, and who expect to reap its benefits. If, under the circumstances of this case, the property sold was equally bound; if the sheriff had a legal right to sell, then the notice does not affect the purchaser's title. He had a legal title, and therefore a perfect one. He could have recovered in trespass, and may now, being in possession, successfully defend against Besseleu. To set aside such a sale, and subvert such a title on motion, would be a novelty; and if the sale be allowed to stand, it would be preposterous to compensate Besseleu by compelling the plaintiff to refund the proceeds.

I do not think, therefore, that the conduct of the sheriff and plaintiff was unlawful, in the only available sense of the word. It is said, then, partiality and injustice afford a ground of relief. These are vague terms. The judgment and execution can not be said to be unjust, without derogating from the court, and partiality is not repudiated in the law. A failing debtor is allowed to show partiality by preferring some creditors to others. A plaintiff having a judgment against several for the same demand, may show partiality by laying his execution on the goods of either. Where a defendant has put away his property, bound by execution, in the hands of several persons, the plaintiff may select the one who shall suffer. And one who holds the bond of a principal, with several securities, may sue one alone, and omit all the others. There is nothing in the objection. What would be the result of such an application, on a proper case made before sale, this court will not anticipate, and forbear to express an opinion.

The motion is dismissed.

JOHNSON and O'NEALL, JJ., concurred.

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AUDITA QUERELA.—The definition of, object of, etc., of this writ are given in *Staniford v. Barry*, 15 Am. Dec. 692 and note; and in *Little v. Cook*, Id. 698.

## TOPHAM v. ROCHE. CORBETT v. ROCHE.

[2 HILL, 307.]

**A PRINCIPAL IS BOUND BY THE ACTS OF HIS AGENT**, done within the regular course of his employment, even though done in opposition to his special command, if this command was not known, at the time, to the person contracting with the agent.

**ASSUMPSIT FOR GOODS FURNISHED**, without request, express or implied, or acceptance of the goods, by the defendant, even though the benefit of the goods has reached him, will not lie. Therefore, where one assuming to act as agent for defendant, in his absence, caused to be furnished to his shop goods which were then used in the trade of the shop, said assumed agent not having authority for such purpose, defendant was held not liable.

**ASSUMPSIT.** Defendant, a merchant tailor, departing for Europe, left one, Lane, in charge of his shop as cutter, with orders not to buy on credit. He also appointed one Seymour his attorney, during his absence. Seymour paid the current expenses of the shop, and paid for the goods furnished the shop, or ordered them when needed. Lane nevertheless induced plaintiffs to furnish the goods, the value of which is now in controversy, on the credit of defendant, by leading them to believe that his authority extended to giving orders for goods. The two cases, depending upon the same evidence, were tried together. The jury, though charged that defendant was not liable under the circumstances, yet found for plaintiffs. Defendant appealed and moved for a new trial.

*Pettigru*, for the appellant.

*Frost and Rice*, contra.

**JOHNSON, J.** The plaintiffs' cases are founded on the assumption that Lane was authorized by the defendant to purchase the goods on his account, and whether he was or not, constitutes the leading question in this case. The absence of the proof of any special authority for that purpose, is in itself conclusive that none such was given, and in addition to this, the converse is as clearly proved as it is possible to prove a negative; in the last conversation he had with defendant he was told not to credit. But the defendant was a merchant tailor, and Lane was employed in his shop as cutter and foreman, and it is contended for the plaintiffs that this relation between them constituted Lane the defendant's general agent to contract for him in relation to everything connected with the business of the shop.

The principal is bound by the acts of his agent done in the regular course of his employment, and if purchasing goods for the use of the shop, regularly and properly belongs to the department which Lane occupied in the defendant's shop, then, of course, the defendant is bound; but otherwise, not. The terms "cutter and foreman," by which Lane's station in the shop is expressed, do not in themselves necessarily indicate an authority to bind his principal by purchases made for the use of the shop. As I understand them, they held Lane out to the community as one skilled in the art of cutting clothes, and confer on him a general superintendence of the work done in the shop. I profess, however, not to be well informed as to the nature and extent of this agency, and it may import more than I have supposed. The extent of it can only be resolved by the usages and general understanding of the community. Mr. Seybring, the only witness who testifies as to this point, says generally, that in the absence of the principal, when no attorney is appointed, the cutter and foreman, when they concenter in the same person, has the care of the business; and that is in accordance with what I have before stated. But certainly there is nothing in this evidence of the usage and understanding of the community which would have authorized Lane to purchase goods, even for the use of the shop, on the credit of the defendant. Such authority does not, as before observed, obviously arise out of the nature of the agency, and if the general understanding has extended it beyond what it imports, it was incumbent on the plaintiffs to have shown it.

The witness Lane testified that the goods were appropriated to the use of the defendant; that they were worked up in his shop and sold to customers for the benefit of the defendant; and it is insisted that on that account the defendant is liable, conceding that he was not bound by the contract of Lane.

In *Exall v. Partridge*, 8 T. R. 310, Lord Kenyon denies most authoritatively that one can, by a voluntary payment of money for another, make that other his debtor; for he observes, that if I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor, *volens volens*, which will not be allowed. And per Lawrence, J., "one of the propositions stated by the plaintiffs' counsel certainly can not be supported, that whoever is benefited by a payment made by another, is liable to an action of assumpsit by that other; for one person can not by a voluntary payment raise an assumpsit against another," and the same principle is

again advanced by Lord Kenyon in *Child v. Morley*, 8 T. R. 613.

The rule laid down by Saunders, on which the counsel against the motion has mainly relied, is, that when a party derives a benefit from the consideration, it is sufficient, because it is equivalent to a request; and the examples which he puts in illustration, are when one pays a sum of money or buys goods for me without my knowledge, and afterwards I agree to the payment, or receive the goods, that this is equivalent to a previous request: 1 Saund. 264, note. But I apprehend there is nothing in this rule inconsistent with that laid down in *Exall v. Partridge*. In the case supposed, there is an express promise to pay the money advanced without the knowledge of the promisor, and an actual receipt and acceptance of the goods purchased; and the obligation to pay arises out of the act of the promisor, and not out of the voluntary act of him who pays the money and purchased the goods; and that constitutes the true distinction. One can not make another his debtor against his will; but if the party charged has derived a benefit from money paid or laid out by another, and he promise to pay it, or does any other act from which his assent may be fairly inferred, he is liable. There is no evidence that the defendant ever promised to pay the plaintiffs for these goods, or that he ever did any other act from which his assent could be inferred. His liability, if he be liable, rests upon the fact that the goods were made up in his shop, and sold to customers on his account. If we were at liberty to substitute our notions of moral right for the rules of law, founded on a broad and general view of the true interest of society, I should be disposed to think there was some merit in this claim; but upon a closer examination we shall find that however reasonable it may be, it was utterly impracticable as a rule of right. Lane took upon himself, without authority, to purchase goods from the plaintiffs on account of defendant. They were mixed up with other goods of defendant, made into clothes by his workmen and sold to his customers, and according to the most refined notions of equity, the defendant would only be liable to the precise extent to which he was benefited; to ascertain this, the most minute account of every article, and the value of every stitch in making the different garments, would be necessary, and it is enough to say, that such an account is utterly impracticable—it is precisely the case of one man's so mixing up his money or goods with that of another that they can not be distinguished and separated, and for his wrong he is subjected to the loss of his goods.

The cases of *Edwards v. Smith*, 22 Com. L. 630; *Bennett v. Henderson*, 3 Com. L. 526;<sup>1</sup> and *Winkfield v. Packington*, 12 Com. L. 755,<sup>2</sup> relied on by the counsel, do not appear to me to have any direct bearing on the case. In the two first, the question was, whether the principal was bound by the contract of his agent made in the course of his employment. Here the question is, whether the agent had authority to contract for his principal.

The motion must therefore be granted.

HARPER, J., concurred.

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ONE CONTRACTING WITH A GENERAL AGENT is not affected by the existence of any private instructions between principal and agent: *Munn v. Commissioners*, 8 Am. Dec. 219.

ASSUMPSIT WILL NOT ALWAYS LIE because the benefit of money has reached defendant; a stranger can not, of his own motion, constitute himself a creditor: *Turner v. Egerton*, 19 Id. 235; see *Forsyth v. Gannon*, 21 Id. 241.

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## IN THE MATTER OF KOTTMAN.

[2 HILL, 363.]

CUSTODY OF A CHILD BROUGHT UP ON HABEAS CORPUS will not be ordered delivered to the legal guardian. The purpose of the writ is answered by informing the child that it is at liberty to go where it pleases.

IDEM—BUT IF THE CHILD BE OF TOO TENDER AN AGE to exercise a power of choice, then the custody will be ordered so delivered.

THE RETURN OF SUCH CHILD may be protected, at the discretion of the court, if there be reason to fear that the parent or guardian will attempt to take possession or control of the child for an improper purpose.

HABEAS CORPUS. Upon writ directed to Mrs. Thompson, Frederick Kottman, minor, fifteen years old, was brought into court. Motion was then made in behalf of Kottman's father, that the custody of the child be delivered him. The court refused to do more than inform the child that he was at liberty to go where he pleased. Owing to affidavits filed by Mrs. Thompson, to the effect that Kottman's father had been guilty of unprovoked cruelty towards him, the court required of the father security against the further repetition of such cruelty. The father appealed.

*Bailey and Pelligru*, for the appellant.

*Grimke*, contra.

HARPER, J. There is no question of the perfect legal right of a father to the possession and control of his child. It is a differ-



ent question, however, whether he is entitled to the aid of the process of the court to recover a truant boy from any one with whom he may chance to have taken refuge. In general it will not admit of doubt that the only object of the writ of *habeas corpus* is to set at large those who are illegally restrained of their liberty, and this applies equally whether the person restrained be an infant or of full age. That this is the principle will easily appear from a reference to the cases. When an infant is brought up, however, on a suggestion of being illegally restrained, the mere order for his discharge, informing him that he is at liberty to go where he pleases, would only amount to this, that the parent who is present, might take the possession and government of the infant. But if the court perceives that the parent desires to regain possession of the child for any ill purpose, or that it might be dangerous for the child to return to him, it will protect the child *redeundo*, and restrain the parent from meddling with him. This is the only discretion which the court of law is at liberty to exercise. In the case of very young children, who are incapable of judgment or choice, they must always be detained by the act of the person in whose custody they are, and the court will direct them to be delivered to the parent or other person entitled to the custody. The case of *The King v. Johnson*, 1 Str. 579, which was relied on on the part of the appellant, illustrates this. In that case the infant is stated to have been nine years of age. The court at first doubted whether it could do more than to declare the infant at liberty to go where she pleased, but finally decided that as she was a very young child, who had no judgment of her own, she should be delivered to her guardian. In other cases commenting on this, it is stated that the child was but six years old: 8 Mod. and 3 Burr. 1436; in *Rex v. Smith*,<sup>1</sup> however, that decision was disapproved of, of course, on the ground that the infant was old enough to have some judgment and capacity of choice, and the court declared that upon this writ it could only deliver the infant out of custody, and inform him he was at liberty to go where he pleased. In the *Matter of Waldron*, 13 Johns. 418, it was said that the court was bound *ex debito justitiæ* to set the infant free from any improper restraint, but it was matter of discretion whether to deliver him to any particular person; and to the same effect was the decision in the *Matter of Dowle*, 8 Johns. 255,<sup>2</sup> where the court sent an officer to protect the infants in returning. Perhaps it might be more correctly said that the

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1. 2 Str. 982.2. In the *Matter of McDowles*, 8 Johns. 830.

office of the court is to discharge the infant from illegal restraint, and that the discretion is to protect the infant in returning. What is said by Lord Mansfield in *Rex v. Sir Francis Blake Delavel*, 3 Burr. 1434, has been commonly referred to as explaining the law on this subject: "In cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infant free from an improper restraint; but they are not bound to deliver them over to anybody, or to give them any privilege. This must be left to their discretion according to the circumstances that shall appear before them."

There is also a privilege *redeundo*, unless the court should see cause to declare the contrary. In the case of *The King v. Ward*, 1 Bl. 386, where a *habeas corpus* was granted to bring up an infant of the age of eighteen years, who was suspected of an intention to elope and marry improperly, no final order of the court in the matter is reported. I suppose, however, that if upon her being brought before the court, it had appeared that she was under no restraint, the court in ordering her to be discharged would not have interfered with the father's right to take her into his custody. In the case *Ex parte Anne Knee*, 1 Bos. & Pul. N. R. 148, where the infant was ordered to be restored to its mother, it is apparent that it was a very young child at nurse, and so in *The King v. Moseley*, 5 East, 224, where a young infant had been taken from its mother by force.

In the case before us there is nothing for this court to do. The judge below directed the boy to be discharged, and the father supposed himself to be restrained from meddling with him. We can not reverse what is passed. We can only say that Mrs. Thompson is not entitled to the custody of the boy, and that the father has the legal right to take him where he can find him. It must be at his own risk, however, if he should commit a trespass in doing so. The appellant has been bound in recognizance to be of good behavior towards his son. This will not be forfeited by his taking him into possession, treating him properly, even if he should inflict moderate chastisement on a proper occasion. It will be forfeited by immoderate chastisement or cruel treatment.

Motion dismissed.

JOHNSON, J., concurred.

O'NEALL, J., absent.

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The note to *State v. Smith*, 20 Am. Dec. 332, discusses the like subject-matter to that of the principal case.

**MARTIN v. WILBOURNE.**

[2 HILL, 396.]

**A STATUTE AUTHORIZING SHERIFFS TO MAKE DEEDS**, in pursuance of the levy and sale made by their predecessor, if the latter "is dead, resigned, or removed from office," extends to a removal from office brought about by the expiration of the incumbent's term of office.

**A MISRECITAL IN A SHERIFF'S DEED**, of the facts authorizing his conveyance, will not avoid the deed, if the necessary facts actually exist.

**TRESPASS to try titles.** Plaintiff claimed under a sheriff's deed, executed by the sheriff of Union, in pursuance of a levy and sale made by his predecessor in office. There was a recital in the deed that the levy and sale had been made by the incumbent. The deed was objected to: 1. There was no authority in the sheriff to execute it under the circumstances. 2. Upon the ground of the misrecital. The last ground of objection prevailed, and a nonsuit was granted. This was a motion to set the nonsuit aside.

*Dawkins*, for the motion.

*Herrdon*, contra.

**HARPER, J.** The most important question in the case is, whether, under the act of assembly of 1803, where land has been sold by the sheriff, but his office expires before title made, his successor may execute the conveyance. The terms of the act are, "that in all cases where any sheriff of this state shall have legally sold, or hereafter shall sell, any tract or tracts of land, and such sheriff is now dead, resigned, or removed from office, or hereafter shall die, resign, or be removed from office, before such sheriff shall have made and executed title therefor to the purchaser, it shall be lawful to and for the successor in office of such sheriff, upon the terms of such sale being complied with, to make and execute good and sufficient title to the purchaser for the land so sold."

The question arises on the words, "or be removed from office." It is contended on the one hand, that these words only apply where the sheriff has been removed from office by conviction on impeachment; on the other, that they apply equally where the sheriff is removed by operation of law, at the expiration of his term of office. The former seems to be the more natural and obvious construction, but the words will admit of the latter, and from the whole character of the enactment, I am inclined to think the latter the true one. The principal reason is, that the necessity and propriety of the provision exist in the case of a sheriff's going out of office by the expiration of his

term, in as great a degree, and indeed in a much greater one, than where he is removed on impeachment or resigns. In the case of the death of the sheriff, there was an obvious necessity for this provision. Admitting that, as at common law, the sheriff, after going out of office, might go on to complete the official acts which he had begun, and that this applies in the case of land levied on, yet in the case of his death, there was no one who could complete the conveyance. The land could not go to his executors. It was therefore necessary to provide some one to complete the transaction. But this does not apply in the case of his removal, or impeachment, or resignation. If there was any incapacity in the sheriff to convey, when he was removed on impeachment, or at all events, when he had resigned, or any inconvenience in requiring or permitting him to do so, the same incapacity or inconvenience existed when he was out of office by the expiration of his term; and the necessity of legislative interference existed in a much greater degree, as it was a case of much more frequent occurrence. When the terms of the act may be made to embrace both the greater and the lesser evil, should we be justified in restricting it to the latter?

As to the question arising out of the misrecital in the sheriff's deed, on which the decision of the presiding judge seems to have turned, I think it must be regarded as settled by the case of *Harrison v. Maxwell*, 2 Nott and McC. 347 [10 Am. Dec. 611], and *Holloway v. Birtwhistle*, reported in a note to that case. In the first, the sheriff's deed recited a *fi. fa.* issued from Abbeville district. Evidence was given of a *fi. fa.* from Laurens district, under which he had sold, which was objected to. The court, after observing that recitals are convenient but not indispensable, adds: "The bare recital in a deed is not a substantial or efficient part of it; nor is it evidence of the facts recited, except between the immediate parties to it." *Phill. on Ev.* 356. After reference to the authorities, it is said: "It would appear from these authorities that a recital in a deed might or might not be made at discretion, and consequently a misrecital of that which is legally immaterial, is unimportant. It is not the recital of a power and authority to sell and convey which gives the right, nor is it evidence of the right; it is sufficient that the right did exist, and that the seller acted upon it." And in *Holloway v. Birtwhistle*, it is said to be sufficient to show that the sheriff was authorized to sell, and did sell.

The motion is granted.

JOHNSON and O'NEALL, JJ., concurred.

MISRECEITALS IN A TAX DEED, what effect of: *Jackson v. Shepard*, 17 Am. Dec. 512, and note.

SHERIFF WHO HAS GONE OUT OF OFFICE may complete by deed the execution levied while he was yet in office: *Allen v. Tremble*, 7 Id. 730.

## MURPHY v. HIGGINBOTTOM.

[2 HILL, 397.]

CAVEAT EMPTOR APPLIES TO EXECUTION SALES, and bars a purchaser at such sale, who has suffered a recovery of the property bought, by title paramount, from recourse against the plaintiff in execution.

A BOND OF INDEMNITY TO THE SHERIFF, to protect him from the consequences of a sale under execution, has no effect beyond the parties to the bond, and will give a purchaser who has suffered a recovery of the property bought at the sale no additional right of action.

ASSUMPT. Plaintiff at an execution sale had purchased a negro slave, of which he subsequently suffered a recovery by title paramount. Defendant was one of the execution creditors, and had received a portion of the purchase money paid at the sale; it was the object of this action to recover that portion. Plaintiff also relied upon it, that the sheriff by whom the sale was made had only carried out the sale, after an indemnity against its consequences had been promised him by defendant, and only paid over this portion of the proceeds to defendant after he had given him a bond of indemnity.

*Bonsall*, for the motion.

*Patterson*, contra.

O'NEALL, J. Like the presiding judge below, I have been much disposed to sustain this action; but on reflection, I am satisfied that it can not be done without an unprecedented violation of fixed principles.

The general and well-established legal rule is, that there is no implied warranty of title at a sheriff's sale; the interest of the defendant is alone sold. The purchaser is to judge for himself, whether he can obtain anything by his purchase; if he buys, and is unable to support his title to recover or retain possession of the land or property bought, the maxim *caveat emptor*, which governed his purchase, will generally exclude him from any recourse upon the sheriff, the plaintiff at whose suit the sale was made, or the defendant as whose property the land or personal chattels was sold.

The only cases which I recollect, and which can be urged as

exceptions to this rule, are the cases of *Herbemont v. Sharp*, 2 McCord, 264, and *Minter v. Dent*.

The case of *Herbemont v. Sharp* was the case of a rule to show cause why satisfaction should not be entered on the *fi. fa.* under which a tract of land had been levied on and sold, and purchased by the plaintiff as the defendant's property. The plaintiff, it seems, discovered immediately after the sale that the land was not the property of the defendant; he refused to comply with his bid, alleging, as it would seem from the report, that the defendant had falsely represented the title to be in him, when such was not the fact. The court recognized the doctrine that there was no implied warranty at sheriff's sale; but held that the plaintiff, not having completed his purchase by receiving the sheriff's deed, "was not bound, or was at liberty to show that the title was not in the defendant, or that he was guilty of the fraud charged."

In the case of *Minter v. Dent*, the owner of property sold by the sheriff gave a false representation of it, which induced the defendant to buy. The defendant having discovered the defect (a want of sense in a negro woman), refused to comply with his purchase, and the sheriff resold. In a suit by the owner against the defendant, to recover the difference between the first and second sale, it was held that evidence of the unsoundness complained of might be given, on the ground that the false representation was equivalent to an express warranty.

These cases do not trench upon the general rule, but rather affirm it. In the case of *Davis v. Hunt*, 2 Bail. 418, it was held that although Gist had bought his own land, at a sheriff's sale of it as the property of another, and had received the sheriff's deed, he was bound by his purchase, and must pay the amount of his bid. From which it would seem to be clear beyond all doubt, that there is no implied warranty in any case at sheriff's sale.

This case is in effect seeking to set up an implied warranty, on the part of the plaintiff, of the title sold at his instance at sheriff's sale: this can not, I think, be done. For if there is no implied warranty between the sheriff and the purchaser, there can be none between the latter and any of the other parties.

There is something imposing in the view that the defendant indemnified, and thus procured the sheriff to sell: but unless the bond could amount to a warranty of title, or to a false representation of title when none existed, it can not entitle the plaintiff to recover. It can not have either of these effects. It

is merely the undertaking of the defendant, to save the sheriff harmless for levying on and selling property supposed to be the property of the defendant in the execution. This can not have any legal effect beyond the parties to the bond.

In *Adair v. McDaniel and Cornwell*, 1 Bail. 158 [19 Am. Dec. 664], it was held that the fact of indemnification did not entitle the creditor giving the indemnity to the proceeds of the sale against senior executions; nor did it justify the sheriff in refusing to pay over the proceeds to such elder executions, because the debtor's title to the property was in dispute, and the sheriff sued for the trespass in making the levy and sale.

That case shows that the creditor's right to the proceeds of the sale does not depend on the bond of indemnity; that arises out of, and depends on, his execution. The bond of indemnity must therefore be confined to its proper office, that of protection to the sheriff, and can not be laid hold of by a purchaser as a warranty of title.

The motion is dismissed.

JOHNSON, J., concurred.

HARPER, J., absent.

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REMEDY OF PURCHASER AT EXEMPTION SALE getting no title: *McGhee v. Ellis*, 14 Am. Dec. 124 and note, and *Muir v. Craig*, 25 Id. 111.

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## SUMNER v. MURPHY.

[2 HILL, 488.]

**DECLARATIONS OF PLAINTIFF'S ANCESTOR**, upon various occasions, running through the whole period of the possession of defendant's predecessor, introduced by defendant for the purpose of showing the character of that possession, will render admissible in plaintiff's favor the declarations of the same person made during the same period, explanatory of the possession, though not made at the very times at which the declarations relied upon by defendant were spoken.

**RECORD OF A SUIT FOR THE RECOVERY OF LAND** can not be evidence in an action against the defendant for the recovery of rent of the premises, and therefore one interested in the event of the latter suit is yet competent to testify in the former.

**THE STATUTE OF LIMITATIONS** will run in favor of a permissive occupancy, if its inception was under a parol gift of the land.

**ADVERSE POSSESSION** is the actual occupation of land as one's own. It is not necessary to its existence that there should be any act or declaration of the occupant affirming an exclusive claim, if from the manner in which the possession took rise, as when taken under a parol gift, it appear that the occupant held the land as his own.

IT IS NO DEFENSE AGAINST THE LEGAL TITLE that this was retained by plaintiff under an agreement that this should be done in order that the land might be effectually shielded against the claims of defendant's creditors.

TRESPASS to try titles. Plaintiff claimed as devisee of Mill Sumner, deceased. Defendant, under Giles Sumner, also deceased, was a son of Mill. It was claimed by defense, that Giles Sumner had gone into possession under a parol gift of the land, made him by Mill Sumner, and had remained in possession a length of time sufficient to give title under the statute of limitations. The fact of the parol gift was denied by plaintiff. In support of his position, defendant relied upon declarations of Mill Sumner, made upon various occasions, running through a period embracing the whole period of Giles Sumner's occupancy, and extending to a certain distance of time after his death. Plaintiff thereupon gave in evidence declarations of Mill Sumner, made upon the subject at different occasions during the same period, though not upon the same particular occasions. There was no evidence that Giles Sumner held adversely to his father, other than that afforded by the claim, that his occupancy had its inception in a parol gift. The other facts sufficiently appear from the opinion.

*Thompson*, for the appellant.

*Herndon*, *contra*.

O'NEALL, J. The first ground for a new trial can not avail the defendant; for the presiding judge reports that he admitted the declarations of the deceased (Mill Sumner) to be given in evidence, according to the rule laid down in the case of *Sims v. Saunders*, State R. 374, and *McKane v. Bonner*, 1 Bail. 113. These cases have also the sanction of this court in the case of *Newman and wife v. Wilbourne*, 1 Hill Ch. 13. I agree, however, with the presiding judge and the counsel for the defendant, that the rule ought not to be extended beyond the class of cases which it covers. If, in this case, the defendant relies on the possession of Giles Sumner, connected alone with the declaration of the deceased (Mill Sumner) at the time he was building, which was the commencement of his possession, I do not think that any after declarations of his father ought to be received in evidence for the plaintiff; but if he relies, as the judge says, on Mill Sumner's declarations, running through the whole period in which Giles had possession, then his declarations, made at any time during the possession of



Giles, would be evidence for the plaintiff. This explanation of our view of the application of the rule in *Sims v. Saunders* to this case, will be sufficient to guide the court in the admission of evidence on the next trial.

2. We agree with the presiding judge below, that Sum Sumner was a competent witness for the plaintiff. For although the defendant had possession of the land during the life-time of the witness' testator, who claimed rent from him, and which is now in a process of recovery by his executor, and which, if recovered, would fall into the residuum of his estate, in which the witness is interested as a residuary legatee, yet he can gain or lose nothing by the event of this suit; nor can this record be evidence for or against him. The decision of this case will neither establish nor deny the right of the testator to recover the rents sued for; in that case his title to the land can not come in question; the isolated question will be whether the defendant rented it from him.

3. The third ground constitutes such exceptions to the judge's charge as to entitle the defendant to a new trial. The judge below held, "that a mere occupation, by permission, even under a parol gift, would not confer title under the statute of limitations; that such a possession was a mere tenancy at will, and that it did not become adverse except by some act or declaration by the occupant, affirming an exclusive claim in his own right, and in defiance of his against whom he claims." This was, I think, in some respects, an erroneous view of the law, and it may have misled the jury. In the first place, I think, "that a mere occupation, by permission, under a parol gift, would confer title under the statute of limitations." It is true, as the judge says, it is a tenancy at will in its commencement, and I will add, until the time limited by the statute has run out; then it becomes a good and indefeasible title in law against the grantor. The occupant is in possession, in his own right, and claiming it as his own, and although this possession is permissive, that is, by the consent of the grantor, and may be ended by him at any time he thinks proper to do so, provided it is before the time limited by the statute, yet, after that time has run out, he can not claim to defeat it, because it commenced under him. In the case of *Willison v. Watkins*, it was held, that "if the tenant disclaims the tenure, claims the fee adversely in right of a third person, or his own, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right:" 3 Pet. 49. The reason is, because his

act has furnished his landlord with the legal right to enter upon him; and after the lapse of the statutory time he must be regarded as in by his own title. So in *Simmons v. Parsons*, decided at this place in December term, 1829 (not reported, although it ought to have been long since, and will be, I hope, in a note to this case),<sup>1</sup> it was held that an entry and possession for more than five years before 1824, under a contract of purchase, not in writing, would confer a good title. In that case, as in this, the verbal contract to buy, under the statute of frauds and perjuries, only amounted to a tenancy at will until the statute ran out, and then it became a legal title, for the entry then is to be regarded as in the title of the occupant. The case of *Roberts v. Roberts*, 2 McCord, 268 [13 Am. Dec. 721], is the very case before us: there a possession of five years, of land under a parol gift, was held to be a good title under the statute of limitations.

In the second place, the judge is in error in supposing that some act or declaration of the occupant, affirming an exclusive claim in his own right, was necessary in order to give title under the statute. It was necessary that he should hold possession of the land for himself, as his own, and not for another. This was to be judged of from the manner in which he acquired possession. If it was delivered to him by his father as his own, and he cultivated and used it as such, then there was no necessity for any other distinct assertion of title.

In the third place, there was error in the judge's charge in supposing that the possession of Giles Sumner must be in defiance of his father's right, against whom he now claims. This error has already been partially demonstrated; but adverse possession is not always a hostile possession to the title of him who claims against the occupant. It very often commences and is perfected under that very title, and derives its effect from it. It is said in *Simmons v. Parsons*, adverse possession "is the actual occupation or *pedis possessio* of land as one's own." This may either commence in a permission from the grantor to the occupant, to so regard it, or it may commence in an entry against his will. In this case, the deceased, Giles Sumner, had the actual occupation, or *pedis possessio*. How did he hold it? For himself or for his father? This is answered by the manner in which he acquired possession: If it was given to him by his father, it is clear he held for himself, and his title is good to the extent of the boundaries of the land intended to be

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1. 2 HILL, 492, note.

given; if it was not given, then he held for his father. So the true questions for the jury were: 1. How long was Giles Sumner in possession before 1824? 2. If more than five years, then did he hold the possession under a gift of the land by his father to him? And, 3. Did that gift intend to embrace the whole of the land in dispute? If these questions are answered affirmatively by the jury, then the defendant must have their verdict. If the two first only can be answered generally for the defendant, and the third only in part, then the plaintiff must recover so much of the land as is not embraced in the parol gift.

This is giving to the parol gift its true effect. It does not operate as title *per se*; but it gives a character to the possession, and operates as a color of title, to show how far the actual possession should have constructive effect.

4. As to the defendant's fourth ground, I do not think that there is anything in it. For, if it were true that it was the understanding between the father and son, that the son should be the real owner of the land, but that the father should retain the title to protect it against his debts, I apprehend the son would be bound by the arrangement, and could not dispute his father's title. For such an arrangement can occupy no better position than if Giles Sumner had conveyed the land to his father, Mill Sumner, to evade the payment of his debts; in such a case, the conveyance would be void against his creditors for covin in law; but it would bind him and his heirs.

The motion for a new trial is granted on the third ground.

JOHNSON and HARPER, JJ., concurred.

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**ADVERSE POSSESSION.**—Entry under color of title, however unfounded, is sufficient to constitute adverse possession: *La Frombois v. Jackson*, 18 Am. Dec. 463; whether color of title may originate without writing, see the note to *Ferguson v. Kennedy*, 14 Id. 764. To constitute adverse possession, it is only necessary that possession be taken as of one's own land: *French v. Pearce*, 21 Id. 680.

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## McKAIN v. LOVE.

[2 HILL, 506.]

A VERDICT WILL NOT BE SET ASIDE, because the jurors by whom it was given knew of facts affecting the credibility of the witnesses in the case.

TROVER. The facts appear from the opinion.

McWillie, for the motion.

JOHNSON, J. The affidavits submitted in support of the motion, make out substantially the case stated. Upon an inquiry made in the jury-room as to the character of a female witness who had been sworn for the plaintiff, one of them, George M. Perry, stated that he had understood she was "the kept mistress of the plaintiff," and Perry himself swears that he had heard such a report. Some of the jury say that their opinions were influenced by this sentiment, and others that it had no influence on them.

The oath usually administered to the jurors in the common pleas, well and truly to try the issue joined between the parties, "and a true verdict give according to the evidence," contains a very correct summary of the law on this subject. The jury are bound to give their verdict according to the evidence, and what is or is not competent evidence belongs to the court, and not to the jury, to determine. Generally speaking, therefore, a verdict founded on facts, first disclosed in the jury-room, would be bad, although the facts are known to one of the jury; because it is unfair not to give the party against whom they operate, an opportunity of repelling or explaining them. In an anonymous case in Salk. 405, pt. 3, it is said, that if a juror know, of his own knowledge, anything material to the matter in issue, the fair way is to tell the court, so that he may be sworn as a witness.

This rule must be understood, however, with some limitations. The constitution of the trial by jury presupposes that they will act, in some degree, from their own knowledge of the character of the parties and their witnesses. It is for this reason that the jurors are drawn from the vicinage, and any effort to restrain by rule the influence of the many collateral circumstances which enter into almost every complicated case, from having their own weight in the consideration of the jury, would be as vain as to attempt to prescribe rules for the operation of the human mind. In Bac. Abr., tit. Juries, M, 1, it is said, that "it is not so easy to attain a jury for finding a verdict against evidence, because they may have evidence of their own cognizance of the matter before them, or they may find on distrust of the witnesses on their own proper knowledge;" and that it must be so, will occur to every one who reflects on the organization of the jury, and the nature of the service they are required to perform. They are, as before remarked, collected from the vicinage, and in nine cases out of ten, it is more than probable that all of them can not be wholly ignorant of the matters in

dispute, or of the character of the parties and witnesses, and it is expecting too much of human nature to suppose, even if it was desirable, that this knowledge should not enter into the judgment which they pronounce on the facts. It ought to be so, for little incidents, which can not be developed in evidence, and which may be well understood by a jury, very often stamp upon a transaction its true character, and this is more particularly true with regard to credibility of witnesses. The character of one witness may be above suspicion, whilst that of another may be so infamous as to render him wholly unworthy of credit; with respect to these there can be no difficulty, but no rule can reach all the diversities between these extremes, and their credit must be resolved by the personal knowledge and sound discretion of a jury.

The objection here is, that one of the jury stated to his companions a fact, imputing moral turpitude to one of the plaintiff's witnesses, and, consequently, calculated to lessen her credibility. Supposing that the consultation of a jury is conducted in the most appropriate manner, the first inquiry which would present itself after they had retired to their room to consider of their verdict, would be whether the facts sworn to are true, or rather, whether the evidences were worthy of credit. To this any juror is bound to respond according to his own conscience, and if he is restrained from giving his reasons for his opinions, and each were to act from his own knowledge, it is not probable that they would ever agree. We know from experience, that in questions admitting of any doubt, the only possible means of arriving at unanimity of opinion amongst many, is by a free interchange of thought, and to deny it to a jury would be to defeat the object of the trial by jury.

Here the credibility of one of the plaintiff's witnesses was the subject of inquiry, and one of the jurors stated a fact that he had heard derogatory to her character, but he stated it as a rumor, without, in any manner, giving it his own sanction; and however we may deprecate the introduction of new matter into the jury-room affecting the case in hand, it strikes me that to exclude matter of this sort, would be to strip the trial by jury of one of its most valuable appendages, the right of weighing the credibility of the witnesses.

Motion dismissed.

O'NEALL and HARPER, JJ., concurred.

## COSTELO, ADM'R OF COSTELO, v. CAVE ET AL.

[2 HILL, 528.]

THE DECLARATIONS OF ONE OF SEVERAL JOINT COVENANTORS, relative to the matter of covenant, are evidence against the others.

A NOTE, GIVEN FOR WORK DONE UNDER COVENANT, is an admission that the work was done as required by the stipulations of the covenant.

A NOTE FOR THE AMOUNT DUE ON A COVENANT is not an absolute satisfaction and discharge thereof; and if not paid at maturity, the creditor may sue upon the covenant.

COVENANT. To the covenant were parties upon one side plaintiff's intestate; upon the other, David Cave, deceased at the time of this action, and the defendants. Plaintiff introduced, in support of his case, declarations of the deceased covenantor, Cave. As admissions that his intestate had performed his part of the covenant (the draining of a pond), plaintiff introduced two promissory notes, the one executed to him by David Cave, the other by Bradley, one of the present defendants. The jury found for plaintiff to the amount of the notes. Defendants appealed, and moved for a new trial. The second and third grounds relied upon by them in support of the motion related to the admission of the notes in evidence; their second ground being that the notes should have been rejected; their third, that the presiding judge erred in charging the jury that they might regard the notes as evidence of performance of the intestate, and take them as the measure of their damages.

*Patterson*, for the motion.

*Bellinger*, *contra*.

HARPER, J. The first ground of the motion relates to the admission in evidence of the declarations of the deceased David Cave, who was one of the parties to the covenant. I am of opinion that they were properly admitted. The rule is laid down by Starkie, in his treatise on evidence, that "a community of interest or design will frequently make the declaration of one the declaration of all:" Pt. 4, p. 44. So it is said, "in an action of covenant against two, it was held that the voluntary affidavit of one, upon a subject in which he was jointly interested with the other, is evidence against the other:" Id. 46. In *Whitcomb v. Whiting*, Doug. 652, the action was against one of several makers of a joint and several promissory note, and the acts of one of the makers, not a party to the suit, were admitted to repel the plea of the statute of limitations. Such,

also, was the case of *Beitz v. Fuller*, 1 McCord, 541 [10 Am. Dec. 693]. It was admitted that such is the rule in relation to the statute of limitations; but this was supposed to be a peculiar case. I see no reason for this. On the contrary, one of several makers of a note may not in all likelihood know whether it has been paid by the other parties or not; but he is likely to be informed of the consideration on which it was given. In *Wood v. Braddock*, 1 Taunt. 104, however, the admissions of one partner, who was not a party to the suit, made after the dissolution of the partnership, were received to establish the demand against the other. And in *Fisher v. Tucker*, 1 McCord Ch. 169, in which the subject was very fully considered, the opinion was expressed by Judge Nott, that the declarations of the deceased partner, made after the dissolution, were admissible to establish the demand, though they were not held sufficient for the purpose in that case.

The second and third grounds may be disposed of together.

It was not seriously contended that the promissory notes in question were not given for the balance of the money due on the contract, after the payment of a part in cash.

The giving of the notes by the defendants, after the completion of the work, was certainly an admission on their part that it was performed according to the contract, and as an admission receivable in evidence. It was also conclusive, in the absence of testimony, that they were given under mistake or misapprehension; though it does not appear from the report of the judge, that, in his charge to the jury, he used the terms attributed to him on the third ground. That, in the opinion of witnesses, the work done by the intestate was worth more than he was to receive for it, was certainly some evidence of fidelity on his part in the performance of his contract; nor does it appear that this evidence was objected to.

The fourth ground is, that the evidence on the part of the plaintiffs proved that the defendants had performed their part of the contract. This is, I suppose, that the payment of the money in part, and the giving of promissory notes for the balance, was a satisfaction and discharge of the covenant. The rule of law is perfectly well settled, that if a note or bill be given on account of a previous debt, though by open account or other simple contract, this is no payment, unless it be expressly accepted as payment or produce payment. If it be dishonored at maturity, the party may resort to the original cause of action; though there may be a suspension of the right of

action in the mean time. Still more, when the original demand is by specialty. The case of *Drake v. Mitchell*, 3 East, 251, is expressly in point, except that it is stronger than the present. In that case, one of the joint covenantors gave a bill of exchange for part of a debt secured by the covenant against the three, on which bill judgment was recovered. This was held to be no bar to an action of covenant against the three; the bill, though pleaded to have been given for the payment and satisfaction of the debt, not being averred to have been accepted as satisfaction, or to have produced it in fact. In the case before us, there is no plea that the notes were given or accepted as satisfaction. And if there were, there is not the slightest evidence to support it. On the contrary, the intestate's having retained the covenant uncanceled, affords a presumption that they were not so intended. They have not produced satisfaction in fact. In the case of *Peters v. Barnhill*, 1 Hill, 234, which was referred to, in which a promissory note given by the defendant was held to be satisfaction of a judgment, it is stated that satisfaction had been entered on the execution. This was the most conclusive evidence that the plaintiff accepted it as satisfaction.

The motion is dismissed.

JOHNSON, J., concurred.

O'NEALL, J., absent.

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ADMISSIONS OR DECLARATIONS OF ONE OF PARTIES IN COMMUNITY OF INTEREST OR DESIGN.—The admission of one of several joint defendants is admissible against the others: *Lowe v. Boteler*, 1 Am. Dec. 410. Where community of interest or design exists, the acts of one in furtherance thereof are admissible against the others: *State v. Poll*, 9 Id. 655. So where such community exists, the declarations of one of the parties are admissible against the others: *Snyder v. Laframboise*, 12 Id. 187, and the declaration of one of co-conspirators is admissible against the others: *Metcalfe v. Conner*, 12 Id. 340. But admissions by one of several plaintiffs are not evidence against the others holding as tenants in common with him: *Dan v. Brown*, 15 Id. 395.

NOTE OF DEBTOR OR OF THIRD PARTY OPERATES AS A PAYMENT, WHEN.—The cases in this series upon the subject are collected in the note to *Bank v. Dixon*, 24 Id. 634.

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## STATE v. HILL.

[2 HILL, 607.]

THE DEPOSITION OF A DECEASED PERSON taken in the absence of the defendant in a criminal action is inadmissible.

INDICTMENT for rape. A deposition of the child upon whom the rape was committed was read at the trial. It appeared that



the deposition had been taken at the time that the warrant of arrest for defendant was issued, and while he was not present. The child afterwards died. Defendant was convicted. On the appeal, the question was, whether the deposition was properly read on the trial.

*Pope*, for the appellant.

*Griffin*, *contra*.

JOHNSON, J. The statute of 23 Philip and Mary, made of force by the act of 1712 (Pub. Laws, 59), authorizes any justice before whom any prisoner shall be brought on a charge of manslaughter or felony, to take his examination, and the information of those who bring him, of the facts and circumstances thereof, and the same or so much thereof as shall be material to prove the felony, and within two days thereafter to reduce it to writing and certify it to the next general jail delivery; and the examination of witnesses, taken in conformity with this statute, have been uniformly admitted in evidence against the prisoner, when they had been taken in the presence of the prisoner and an opportunity afforded him of a cross-examination, if the deponent be dead at the time of the trial: *Rex v. Fleming*, cited 1 East P. C. 440; *Rex v. Paine*, 1 Salk. 281; *Webster's case*, Leach, 14; Bull. N. P. 242. In the argument here I understand it to be conceded that the deposition given in evidence was made on the application for a warrant to arrest the prisoner, and in his absence; and the case is narrowed down to the question, whether it was admissible under such circumstances.

The statute does not prescribe any new rule, but simply provides for the examination of the accused and his accusers, leaving the use to be made of the examination, as it used at the common law to be admitted or rejected according to the rules of evidence. Generally, the *viva voce* examination of the witness in the presence of the party on trial is required, because it is the best evidence. The direct and cross-examinations are the best means of eliciting the whole truth, and the manner of the witness is one of the tests by which to determine the degree of credit to which he is entitled; but this is not always attainable, and what a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn on a former trial, is admitted on the principle that it is the best of which the case admits, provided: 1. That the evidence was given in the regular course of a judicial proceeding. 2. That the party

to be affected by it was a party to that proceeding. 3. That he did or might have cross-examined the witness: Stark Ev., pt. 2, p. 261. And it is upon the principle of this rule, that the deposition of a deceased witness, taken in pursuance of the statute, on the examination of one accused of felony, is admitted in evidence. The examination of the prisoner and his accusers, is a judicial proceeding authorized by the statute, for the purpose, in the first place, of enabling the magistrate to determine whether the circumstances furnished sufficient evidence to authorize the committal of the accused, and they are, secondly, certified to the sessions, to enable the prosecuting officer to judge of the propriety of proceeding with the prosecution; and, if the accused is present and has an opportunity of cross-examining the witness, the depositions, according to the rule, are admissible in evidence. Thus far all the authorities agree, but there seems to be great diversity of opinion on the question whether the deposition of a deceased witness, taken in the absence of the accused, is or is not admissible on his trial. In *The King v. Eriswell*, 3 T. R. 707, the question arose whether the examination of a pauper, taken before two justices, relative to his settlement, and who became insane before an order for his removal was made, was admissible in evidence before two other justices, on an application for an order for the removal of his family; and upon a full investigation of the authorities in reference to the question, the court were divided. Buller and Ashhurst, JJ., who maintain the affirmative, proceed on the ground that it was admissible as evidence taken in the course of a judicial proceeding, on which the justices might have founded an order for the removal of the pauper, and, as such, was admissible whether the party to be affected was present or not, and whether he had or had not an opportunity of cross-examining the witness. But Lord Kenyon and Mr. Justice Grose, who support the negative, maintain, I think, with great force, that its admissibility is not to be resolved alone by the circumstance of its having been made in the course of a judicial proceeding, but that it must appear to have been made in a proceeding between the same parties, and when each had an opportunity of cross-examining the witness, otherwise it was *res inter alios acta*, and not to be received.

In *The King v. Smith*, 1 Holt N. P. 614, reported also in 2 Stark. 208 (see 3 Eng. Com. L. 200, 316), it seems to be taken for granted, that on the trial of an indictment for murder, the deposition of the deceased, taken in the absence of the prisoner,

was not admissible. There the whole deposition, except the three last lines, had been written in the absence of the prisoner, but the whole was deliberately read over to the deceased in the presence of the prisoner, and he was asked if he chose to put any question to him, but declined to do so, and Chief Baron Richards admitted the evidence, on the ground that the prisoner had an opportunity of cross-examining the deceased; admitting, however, most distinctly, that according to established rule, it would not have been admissible if the prisoner had not been present at the examination; and he was in so much doubt whether it was admissible, even under these circumstances, that he reserved the question for the consideration of the whole court, when one of the judges dissenting, his judgment was approved; and I take it for granted, that if the examination of the deceased, taken in the absence of the prisoner, had been admissible, the question of its admissibility under these circumstances never could have arisen.

The case of *The King v. Paine*, 1 Salk. 281, is authority at least for the general position that the *ex parte* examination of a witness, although taken in the course of a judicial proceeding, is not admissible in evidence, although the witness be dead, and I have before remarked that the statute does not prescribe any new rule of evidence. It provides simply for the examination of the prisoner and his accusers, for the purpose, as I have supposed, of enabling the magistrate to determine whether the prisoner ought or ought not to be committed; and to enable the prosecuting officer to judge of the propriety of proceeding with the prosecution; and in *The King v. Eriswell*, Lord Kenyon supposes that it was intended to be preserved as a test of the consistency of the witnesses, so that the statute will have had its full and legitimate operation without rendering the depositions competent evidence on the trial, and it never will be inferred that the legislature intended this indirectly to break down one of the most important rules of evidence.

Depositions taken upon a coroner's inquest, in pursuance of the statute of 1 and 2 Philip and Mary, c. 13, seem generally to have been admitted as an exception to this rule on the ground of the publicity and importance of the proceeding; but I incline to think with Mr. Starkie, that even this is not warranted, and that it will deserve grave consideration when the question arises, whether it ought to be supported: Stark. Ev., pt. 2, p. 492. The rules of evidence, as Lord Kenyon observes in the case before cited, do not depend on technical refinement, but

on good sense, and in their application we must constantly keep in view their practical effect and operation, and I venture to affirm that no rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence. Charges for criminal offenses are most generally made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgment may detect, but which it is impossible exactly to describe, and we know, too, how necessary a cross-examination is to elicit the whole truth from even a willing witness; and to admit such evidence, without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community. On principle, therefore, as well as authority, I think the evidence in this case was inadmissible.

Motion granted.

HARPER, J., and EVANS, J. (sitting for O'NEALL, J.), concurred.

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## STATE v. KITCHENS.

[2 HILL, 612.]

UPON LAPSE OF DAY FIXED FOR EXECUTION OF SENTENCE OF DEATH, without the sentence being carried into effect, a new day must be fixed for the execution.

MOTION to discharge the prisoner from custody. Sentence of death had been passed upon defendant, and day fixed for execution of the sentence. This day lapsed without the sentence being carried into execution, owing to the death of the sheriff. A new sheriff was appointed, and thereupon it was moved for the state that a new day be fixed for the execution, whereupon defendant made the counter motion above stated. Prisoner's motion being denied, he took this appeal.

Burt, for the prisoner.

Thompson, solicitor, contra.

O'NEALL, J. It seems that the established practice in England, prior to the stat. of 25 Geo. II., c. 37, was "for the judge to sign the calendar, a list of all the prisoners' names,

with the separate judgments in the margin, which is left with the sheriff," and by it he does "execution within a convenient time." By the statute 25 Geo. II., c. 37, the judges are directed, in cases of conviction for murder, to pronounce sentence in open court, and the statute fixes the time of execution. In this state, the practice has been to sentence the prisoner in open court, and assign a day for his execution. In the case of *The State v. Smith*, 1 Bail. 283 [19 Am. Dec. 679], the prisoner received a conditional pardon, and was discharged from prison; but having afterwards violated the condition, he was held to be liable to execution under the conviction and judgment. So in *Addington's case*, the prisoner, who had violated the condition of his pardon, and in the mean time the statute under which he had been convicted was repealed, was held to be liable to execution. In *Duestoe's case*, the prisoner escaped between judgment and the day of execution, and after some years was taken, another day was assigned for his execution, and he was executed. In *Loyd's case*, the prisoner was not executed on the day assigned for execution, owing to the new arrangement of the circuit court districts under the act of 1800. He was held by the constitutional court not to be entitled to his discharge, a day was assigned, and he was executed. These precedents would be enough to dispose of the prisoner's motion, but the case does not depend alone on them; the same conclusion must have been arrived at if there had been no decision on the subject in the state.

"In the case of the *Earl of Ferrers*, it was resolved by all the judges, that if a peer be convicted of murder before the lords in parliament, and the day appointed by them for execution pursuant to 25 Geo. II. should lapse before such execution done, a new time may be appointed for the execution:" Hawk. P. C., b. 2, c. 51, sec. 1; Fost. 140. That case is perfectly parallel with this, for in both the day of execution is part of the sentence, and in both the execution was not stayed by any act of the prisoner.

But independent of cases, the clear and well-settled principle that the judgment is not executed till the prisoner be hanged until he be dead, is enough to authorize the court to assign a new day. The judgment stands in full force until the prisoner be executed or pardoned. For Hawkins, b. 2, c. 51, sec. 7, says: "It is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again, for the judgment is not executed till he be dead." This shows that

the judgment can only be satisfied by an actual execution, and if the execution attempted is prevented by accident from being effectual, that still the judgment of the law remains and must be executed.

The motion is dismissed.

JOHNSON and HARPER, JJ., concurred.

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Where a prisoner has been sentenced to death, and then received a conditional pardon, he may, if he break the condition, be rearrested and adjudged to suffer the death penalty to which he was originally condemned: *State v. Smith*, 19 Am. Dec. 679; *State v. Addington*, 23 Id. 150.

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## STATE v. FERGUSON.

[2 HILL, 619.]

**MANSLAUGHTER** is the killing of a human being, under the influence of sudden heat and passion, brought on by a reasonable provocation.

**IT IS MURDER** to kill a person, the only provocation being that he has, without using unnecessary violence, separated the prisoner from a person whom he was beating.

**A DEATH-BED DECLARATION**, contained in the form of a deposition taken before the deceased was conscious of his approaching end, is good, if after he was conscious of his state, and very shortly before his death, the deposition was reaffirmed by him, after having heard it read over.

**THE VERDICT OF THE JURY**, "We find the defendant guilty of murder," written on the envelope of the indictment, on which no part of the indictment is written, but which is indorsed with the title of the case, the finding of the grand jury, and the names of the witnesses, and where there is no question raised, but that as a matter of fact, the finding of the jury refers to the indictment under which the prisoner was tried, will be held to be of sufficient certainty as to person and offense.

**INDICTMENT for murder.** The prisoner was found guilty. The verdict: "We find the defendant guilty of murder," was written on the envelope of the indictment. The other facts appear in the opinion of the court. The prisoner appealed and moved for a new trial.

*Lesesne and Eaves*, for the prisoner.

*Player*, solicitor, contra.

**JOHNSON, J.** In considering the grounds of this motion, I propose first to examine the proposition contained in the sixth, in the order in which they are set down in the brief: "That the evidence introduced by the state made out a clear case of manslaughter and not of murder."

This proposition concedes the fact of killing, and assumes that the mortal wound was given when the prisoner was under the influence of sudden heat and passion. The circumstances under which it was given, become, therefore, a necessary inquiry, and all that are material may be collected from the evidence of Thomas Rodman, detailed in the notes of the presiding judge, taken on the trial, and the deposition of the deceased, taken before Justice Stinson, the admissibility of which is to be hereafter considered. According to those, it appears that on the twelfth of November last, the prisoner went on business to the store kept by the deceased, and in the course of the day commenced a quarrel with one Allen. Two other persons present (Walker and McKan) interposed to prevent their fighting. The prisoner then began a quarrel with McKan, who presently got upon his horse and rode off. He then turned on Walker, an old man, much inferior to himself in point of physical strength, and beat and gouged him severely, and was separated from him by the deceased and Allen. Some time after this, the fight was renewed between them in the house, at a time when the deceased was out of the house, and he was told by a negro called Ben that they were fighting again. He went in and endeavored to separate them, but being unable to take the prisoner off Walker, he called in Ben to his assistance; with his aid they were separated, and in the scuffle Ben threw the prisoner against the wall, who called out to part them. The deceased then discovered that the prisoner had a knife in his hand, and attempted to keep out of his way by getting on the opposite side of the counter. When on the counter, in the act of getting over, the prisoner stabbed him in the shoulder, and after he had got over, the prisoner thrust at him again and cut the breast of his coat; a third stab took effect in the right side, inflicting a wound of which he died two days after; and the question is, whether these circumstances make a case of murder or manslaughter.

The distinction between murder and manslaughter, as put in the books, and as generally understood by the profession, is not merely an arbitrary rule, but is founded on a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures. We look in vain through all classes of society, for even one individual who has so much command of himself as to remain passive and unmoved when suffering under personal injuries. Passion arising out of even imaginary

wrongs, frequently gets the ascendancy of distempered minds, and even those that are better regulated are sometimes carried away by the ordinary "ills which flesh is heir to." These may, however, be subdued and overcome by a proper course of reflection and discipline, and it is our duty to keep them within proper bounds; but he who has suffered great bodily harm, the parent who sees his child, or the child who sees the parent, suffering under the hand of ruffian violence, or the husband who finds his wife in the embrace of an adulterer, does not stop to reason about the extent to which he will carry his resentment, and in proportion to the degree of provocation will be the almost certain excess of resentment; and if, under the influence of such an excitement, one man takes the life of another in whose wrong it originated, it is manslaughter and not murder. There must, however, be a provocation—a reasonable provocation, and what will or will not constitute a reasonable provocation, is perhaps the only difficulty in applying the otherwise well-defined distinction between the crimes of murder and manslaughter. The line which distinguishes between those provocations which will and will not extenuate the offense, is not, nor can it be, certainly defined. Those provocations which are in themselves calculated to provoke a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and when applied with judgment and discretion, will usually lead to correct results. Decided cases furnish practical applications of the principle, and are of infinite use in carrying it out. According to those, it is now well established that no provocation, however grievous, will operate to excuse the slayer of the crime of murder, when, from the weapon used, or from the manner of the assault, an intention to kill or to do some great bodily harm was manifest, unless it was accompanied by some act of unlawful violence, or denoting an intention to do bodily harm; nor will even a trivial provocation extenuate the offense, although, in point of law, it may amount to an assault, if the punishment inflicted is outrageous in its nature, either in the manner or circumstance of it, and beyond all proportion to the provocation; because it manifests rather a diabolical depravity than the frailty of nature; and, as more directly applicable to the case in hand, it is laid down by all the criminal law writers that if one interpose in a fray to separate the combatants, and



give notice of his pacific intent, and is slain by one of the affrayers, it is murder: East Crim. L. 233, 234, 304.

The prisoner was in the act of beating Walker, and the only shadow of a provocation proceeding from the deceased towards the prisoner, is founded on the efforts made by the deceased to prevent it; and this, so far from being a reasonable provocation, was both justifiable and praiseworthy, and within the rule before laid down. That the prisoner had notice of the pacific intention of the deceased, is, I think, apparent from all the circumstances. He had before made an effort to separate them, and finding himself unable to effect it, called in the aid of the negro; and if the prisoner thought or reflected at all, he must have discovered in these circumstances, that there was no disposition on the part of the deceased to do him unnecessary hurt. The deceased was justifiable in employing as much force as was necessary to prevent the prisoner from beating Walker, and if he exceeded that limit so far as to become the aggressor, I can well conceive of a state of things which would have extenuated the offense to manslaughter. The prisoner was thrown against the wall by the negro Ben, who was mainly instrumental in separating him from Walker, and if it was an act of revenge, and not the consequence of the act of separating them, it would go far to mitigate the offense. But these circumstances were proper for the consideration of the jury, and I have no doubt that the prisoner had the full benefit of them in their deliberations. There is nothing in their conclusion which strikes the mind as improbable or unreasonable, and their verdict is conclusive.

The first five grounds in the order in which they are stated in the brief, are those on which the counsel appeared to rely most in support of the motion. They deny the admissibility of the deposition of the deceased, taken before Justice Stinson, on the grounds stated in the brief. The facts out of which they arise are very clearly and fully stated in the report. The mortal wound was inflicted on the twelfth of November, the deposition was made on the thirteenth, at a time when the witnesses all concur in saying that the deceased did not manifest a consciousness that he would die of the wound, but on the next day (the fourteenth) the deposition was read over to him, when he remarked, that it was as "nigh right as he could recollect the circumstances," and the witnesses, Justices Stinson and Dr. Gaston, say, confidently, that his danger was then "obvious, and that he himself seemed to be confident of his approaching death."

The principle on which death-bed declarations are admitted is that of necessity. The assassin does not seek the open day or the crowded thoroughfare, to do his deed of darkness, and it frequently happens that none but the victim witnesses the deed. The sanction is that of approaching death. No one who has a proper sense of religion, or who believes in a future state of rewards and punishments, would willingly incur the guilt of falsehood, who had before him the immediate prospect of a final account for the deeds done in the body, when every word, thought, and deed of evil, must rise up for his condemnation. Before they can be received in evidence, it must, therefore, appear that the deceased was *in extremis*, and that he himself was conscious of his approaching death, to be collected from his conversation, or from other circumstances indicating such a state of mind, of which the court is, in the first instance, the exclusive judge: 1 East Crim. L. 354; Stark. Ev., pt. 4, p. 459.

That such was the state of the mind of the deceased, at the time he assented to and reaffirmed the truth of the deposition which he had made the day before, is as fully proven as it is possible to prove such a fact, and these grounds are narrowed down to the inquiry whether this recognition or reaffirmation of the deposition and its contents was admissible as evidence.

The deposition had been read to the deceased, and his declaration was, that "it was as nigh right as he could recollect the circumstances." If the declaration is taken alone and unconnected with the deposition it is unintelligible and unmeaning, but when taken in connection with it, we have a distinct affirmation of the truth of the contents of the deposition, containing in itself a concise and clear statement of the circumstances under which the mortal wound was inflicted; and that the deposition was admissible follows necessarily from the general rule, that declarations are to be taken altogether, and not garbled by suppressing any part of what was said at the time. The contents of the deposition was as much a part of the declarations of the deceased, as the words which he uttered. The reading of the deposition itself was admissible, as containing better evidence of the contents than could be supplied by parol, and in *Trowler's case*, cited in 1 East Crim. L. 356, parol evidence of dying declarations, which had been reduced to writing, were rejected on the ground that the writing itself was higher evidence

There is very clearly nothing in the seventh ground which was superadded by consent at the argument here. It refers to

the circumstance that the verdict was written on the envelope of the indictment, on which no part of the indictment is written, but it is indorsed with the title of the case, the finding of the grand jury, and the names of the witnesses, and there has not been even an insinuation that the indictment indorsed is not the indictment on which the prisoner was arraigned and tried, and to which the finding of the jury refers; on the contrary, these facts are conceded. We are therefore all of opinion that there is nothing in the circumstances of the case, or the several grounds of this motion, upon which the judgment can be arrested, or which entitles the prisoner to a new trial, and the motion is therefore dismissed.

O'NEALL and HARPER, JJ., concurred.

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MURDER AND MANSLAUGHTER DISTINGUISHED: *Pennsylvania v. Bell*, 1 Am. Dec. 298; *State v. Norris*, Id. 564; see, too, note to *Whiteford v. Commonwealth*, 18 Id. 771.

DEATH-BED DECLARATIONS ADMISSIBLE, WHEN: *State v. Moody*, 2 Id. 616; *State v. Poll*, 9 Id. 655; *Vass v. Commonwealth*, 24 Id. 695.

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## OMELVANY v. JAGGERS.

[2 HILL, 634.]

▲ **RIPARIAN PROPRIETOR** is entitled to the accustomed flow of the stream passing through his land, and may sustain an action for any damage done him by the act of the proprietor below, who has dammed up the stream so as to throw the water back upon him, or by the proprietor above, who by diverting the water has decreased its flow through his lands.

**CASE** for damages for obstructing plaintiff's mill. Defendant, a proprietor below plaintiff, had, a short time in advance of the latter, built a mill upon the stream running through the lands of both. Plaintiff found, upon the completion of his mill, that defendant's dam had so raised the water of the creek, that the wheels of his mill did not turn. Thereupon this action was brought. Plaintiff suffered a nonsuit, which he now moves to set aside.

*Gregg*, for the motion.

*Mills*, contra.

**HARPER, J.** The case is not free from difficulty and apparent hardship, but from the best view we can take of authorities and the reason of the law, we are of opinion with the

plaintiff, and that his motion must be granted. There are some *dicta* in the English books which seem to favor the construction of the law which the presiding judge has given; such as that from 2 Bl. Com. 403, that "if a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbor's prior mill, or his meadow, for he hath, by his prior occupancy, acquired a property in the current." But these *dicta* are all, perhaps, susceptible of a different interpretation. The first case in which the point seems to have been directly considered, is that of *Wright v. Howard*, 1 Cond. Eng. Ch. 95 (1 Simons & Stuart, 190), and that case seems more expressly in point than the counsel for the plaintiff supposed. It applies not only to the right of diverting the water from the lands of proprietors below, but that of throwing it back on those of proprietors above. That was a bill for specific performance. The plaintiff was the owner of lands on the river Goit, on which were mills and machinery worked by water taken from the river by means of a weir or dam, and thence conveyed into the river Mersey, below its junction with the Goit. The duke of Norfolk was the proprietor above, on whose land the water was thrown back by the weir, and the duke of Norfolk and two others were the proprietors of lands below, from which the water was diverted. The right to use the water, by means of the weir, was held under a lease from the duke of Norfolk. The defendant objected to the performance of his purchase, on the ground that the plaintiff could not make a good title to the mills; first, because, after the expiration of the lease, he could have no right to throw back the water on the land of the duke of Norfolk above; and secondly, because he had no right to divert it from the proprietors below. The vice-chancellor, Sir John Leach, considers both objections together, and decides them on the same reasoning. "The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream, is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operation, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right to

throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment for twenty years: which term of twenty years is now adopted on a principle of general convenience, as affording conclusive presumption of a grant." He adds: "It appears to me that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose by the party to avail himself of his common right."

The subject is fully considered by Chief Justice Denman, in the case of *Mason v. Hill*, republished in the *Jurist*, vol. 1, pt. 3. That case respected the diverting of water from the proprietors of lands below. All the English authorities and *dicta* are reviewed and commented on, and it is unnecessary to repeat here that which is better said there. The position which is sustained by the court is, "that the possessor of lands through which a natural stream runs, has a right to the advantage of the stream flowing in its natural course, and to use it as he pleases, and for any purposes of his own not inconsistent with a similar right of the proprietors of the land above and below; that neither can a proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without his license or grant; and that whether loss by the diversion of the general benefit of such a stream, be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting."

A distinction was attempted to be taken between the diverting and throwing back of water. But I can not perceive the slightest ground for this distinction. In neither case can an action be sustained; at all events, no damages can be recovered until the party has applied the water, or been prevented from applying it, to a useful purpose; where the injury is sustained, however, on what principle can we make a distinction between the proprietor above and him below? It may be observed that water can not be thrown back on the land of the proprietor above without overflowing his soil. And though the water still remain within its natural channel, being only raised

to a greater height upon the banks, yet still it is, in strictness, an invasion of the proprietor's soil, over which, on general principles of law, he has the exclusive right of dominion. And in reference to this principle I think the right of occupancy must be explained. A man may do what he will upon his own land, provided he does not injure his neighbor. But he has no right to make any alterations in the condition of his neighbor's property without his consent. The other instances of the right of occupancy mentioned by Blackstone, may help to illustrate this. If I build a house near my neighbor's wall, by which my windows are darkened, I can sustain no action for it, because he was the first occupant; so if I erect a tan-yard, which is noisome, and another comes and builds his house near it, I was the first occupant, and he must submit to the inconvenience. So if I raise a mill-pond on my own land, which renders the air unwholesome, and another person comes and lives near it, he has no right of action for this injury. But in neither of these cases is there any interference with the soil of another.

There seems to be a great apparent hardship on the part of the defendant, if he should lose the expense which he has incurred in building his mill. Yet I can conceive that there may be as great hardship on the part of the plaintiffs. They purchased their lands about the same time. The plaintiffs purchased with a view to this mill seat, and paid their money for it. Then who ought to be the sufferer? He who claims to use his own land as he will, or he who claims to alter the condition of his neighbor's property, without his consent, for his own benefit? The result will be that a person who is about to obstruct a running stream, for any purpose, must obtain the license of the other proprietors, with whom his operations are likely to interfere, and it does not appear to me that this can be regarded as a matter of hardship.

There is an American case, *Hatch v. Dwight*, 17 Mass. 289 [9 Am. Dec. 145], in which it is said that the first occupant of a mill seat has a right to sufficient water to work his wheels, even if it should render useless the privilege of one above or below. But we think this opposed to the weight of reasoning and authority. To this is opposed the case of *Platt v. Root*, 15 Johns. 213, in which it was held that the prior occupant of mills below had no right to prevent the erecting of mills above, and making a reasonable use of the water. The case of *Palmer v. Mulligan*, 3 Cai. 307 [2 Am. Dec. 270], is referred to, and the opinion of Mr. Justice Livingston, who utterly rejected the

doctrine that the person erecting the first mill thereby acquired any superior rights. To this conclusion Chancellor Kent arrives, upon a consideration of all the authorities: "Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to flow (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use of it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he can not reasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw back the water upon the proprietors above, without a grant, or an uninterrupted possession of twenty years, which is evidence of it." 3 Kent Com. 353.

The motion to set aside the nonsuit is granted.

JOHNSON, J., concurred.

O'NEALL, J. I am not satisfied that the law is as ruled in the foregoing opinion.

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THE RIGHT OF A RIPARIAN OWNER TO THE ACCUSTOMED FLOW OF THE STREAM: *Buddington v. Bradley*, 28 A.m. Dec. 386, and cases cited in the note thereto.

**CHANCERY CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**SOUTH CAROLINA.**

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**FRASER v. BOONE AND WIFE.**

[1 HILL CH. 360.]

**THE LAST OF TWO INCONSISTENT DEVISES or legacies of the same will, takes effect to the exclusion of the first.**

**BILL** for partition. Different clauses of the will of John B. Fraser, deceased, bequeathed a life estate in the slave George; by the first clause to plaintiff, by the second to Jane B. Fraser, wife of defendant Boone; in each case the remainders over were different. Plaintiff claimed that under the circumstances the legatees took equal interests in the slave, and prayed a sale and a division of the proceeds. The chancellor's opinion in the court below was as follows:

**JOHNSTON**, Chancellor. The defendants contend that the latter clause supersedes the former, and that they, being entitled under it, have a right to the slave George, given to them in it, in exclusion of the plaintiff, who claims under the superseded clause.

The doctrine is plainly laid down in the older authorities, that a subsequent clause in a will shall prevail over a prior clause. But it was said by the plaintiff's counsel, Mr. Blanding, that although the older authorities are to this effect, the courts have subsequently come to a conclusion, that in such cases the clauses shall stand together. Upon looking at the authorities quoted, and others, I find that they use the language attributed to them.

They argue that although the last of two wills supersedes the



first, yet that there is a want of the analogy supposed by the early authorities between the cases of two wills, and the cases of two clauses of the same will. That in the case of two wills, the testator assents to them separately, and that to which he last assents is his last will: but that in the case of two separate clauses of the same will, he does not assent to either before the other, but to both together as an unity, after finishing the whole will. That he does not assent to the clauses of the will, as clauses, but to the whole will consisting of clauses. That it is true, that in revolving in his mind the subjects embraced in the will, he can only give them a successive consideration; but that the assent which he gives, after all the details are arranged, is the only evidence we can have that he intended the paper to stand as his will. That in assenting he has contemplated the provisions as a whole, not only separately but in their relations to each other, and pronounced his work good. That the power to do this, is what is called a sound and disposing mind and memory.

The case was argued before me on the same point, and in the same way. Upon looking at the authorities I confess I was struck with the plausibility, and at first came to the conclusion that the old doctrine had been overruled. But further reflection has satisfied me that properly understood, and as to cases where it has a real application, it has not been. And I am further satisfied that in the cases and authorities where the arguments were used which I have recited, the question which, from the language held, appeared to have been settled, never occurred; and that in them, as in this, an immaterial question was argued.

The ancient doctrine properly understood, is not that all subsequent clauses shall prevail over the prior clauses embracing the same subjects of disposition. But it is, that where a subsequent clause either directly in terms repeals a former, or contains provisions so inconsistent with it, that it can not stand with it, and by implication repeals it, it shall prevail over it.

Now the reason given by the authorities referred to, why the clauses should prevail together, is that the testator has assented to both together, and to one as well as to the other; and that reason is a good one where it can apply, as for instance, where the clauses can be made to stand together. But will anybody contend, that when a testator has said in a subsequent clause, "whereas I bequeathed so and so in a prior clause, now I do hereby revoke the legacies and give them to other persons"—that in such a case the legatees shall concur and both the

clauses stand, simply because the testator assents to his whole will at once? Yet the reasoning goes that length. If the repeal is indirect, by reason of inconsistency or incongruity, is it not as much a repeal as if it were a repeal in direct terms? The court to be sure, would be bound to let the former clause stand, if by any construction it could be made to stand. But if after resorting to all the sound rules of construction the clauses be found too incongruous to prevail together, the latter must be regarded as a repeal of the former, notwithstanding both may have been apparently assented to at the final execution of the will.

Accordingly the cases in which the authorities seem to consider the old doctrines overruled, are cases where in fact it never applied, and where the question really ought to have been, whether the prior clauses could be made to stand with the subsequent, or whether the latter were not so inconsistent with the former as to indirectly repeal them. Let us resort to this inquiry.

Where the conflict is merely between detached words or phrases in a testamentary paper, the rule is to bring the conflicting phrases and words together, and ascertain how the testator intended his expressions thus scattered, to affect and modify each other: and in doing this I am not aware that I am warranted in saying that it was ever held, but I incline to believe, that if it be found, that if effect can not be given to all, those must be rejected which are first in order. But that if by modification, any effect can be given to them, it must be given, and that thus modifying each other the whole of the expressions will be taken together, as an exponent of the testator's intention. This is a rule of construction. I know of no reason why the rule of construction should be different where the conflict is between detached clauses, from what it is where the conflict is between detached expressions.

In this rule, by which detached and conflicting expressions are brought together for construction, there is a real want of analogy between the cases of two wills, and the different parts of the same will: although the want of analogy on the part of assent was, I think, a mere supposition. Where there are two conflicting wills there is never any attempt to bring them together for the purpose of reconciling them, but the latter always operates to the extent of the difference between them, as a direct repeal of the former. It is different where the several parts of the same will conflict.

Let us now bring the two clauses of this will in question together, and see if there be any difficulty. There would have been no difficulty, if the testator, making use of only one clause, had said, "I give my slave George to my son William and my daughter Jane B.," limiting over the share of William, so and so, and the share of Jane, in another way. If he had, making use of only one clause, said, "I give my slave George to my son William—and I give my slave George to my daughter Jane B.," etc., would this, although more at length, have amounted to anything more than filling out the words understood in the sentence I have just before put into his mouth; which, though omitted in that sentence, are really referred to by the copulative conjunction? Would it have amounted to anything more or less than a gift of George to the one and to the other of his children—that is, to both? Now if this would have been the undeniable effect of using such expressions in one clause, is there any magic to change that effect, in his employing two clauses instead of one?

It was argued by Mr. Mayrant, for the defendants, that the limitations over made the bequests inconsistent—that the clauses could not stand together, on that account; and that the latter clause must be preferred. If the limitations over are so inconsistent in enjoyment, that they can not stand together, or with the interests of the particular legatees, that is no reason that the particular legatees should not be made to concur until the time that the limitations shall come to take effect. If then they can not be brought to concur, a partition by sale would be ordered, or the question would then arise between the two clauses, as to the preference to be given to them.

But I see no such incongruity as is supposed. The respective remainders limited over, are precisely of the same extent as the particular estates to which they are attached. One line of remaindermen is entitled to what is given to the plaintiff, and another to what is given to Mrs. Boone. Although the plaintiff and Mrs. Boone are jointly interested, yet upon the death of either, that tenancy is severed, and the remaindermen of his or her line become entitled to his or her share. They may, if they please, concur in the enjoyment, as tenants in common with the survivor; or if they can not concur, they can have partition by sale.

It was argued, again, that the subject-matter of the bequests could not be enjoyed by more than one, and that therefore, the legatees could not concur. That I do not perceive. A

slave may be hired out, or he may labor for the joint benefit of a plurality of persons. But there are cases in which a joint enjoyment of the legacy can not obtain. What then? If the legatees can not concur, they must partition by sale. But the objection is too extensive. I will take the strongest case put by the counsel. Suppose that the Pitt diamond, or some exquisite painting, be given to two persons in two different clauses of a will. If it be contended, that the latter clause shall prevail over the former, it must be on the ground that the bequest is not susceptible of joint enjoyment. If that reason be allowed to prevail, upon the same reason, if such legacy were given to the same persons in the same clause, it must be declared void, or the will must be violated by awarding to one of them in exclusion of the other.

I apprehend, that in such a case (and so also in this case) unless the legatees can be brought to concur in the enjoyment or disposition of the article bequeathed to them, it must, being incapable of division, be sold, and the avails distributed. It is no argument against this to say, that an article, whose chief value consists in taste, would be sacrificed by sale. That is a matter exclusively for the consideration of testators, and for the reflection of legatees. The same difficulty would exist, whether it be disposed of in two clauses of a will, or in one only. Nor do I see reason to fear sacrifices. Granting that besides the legatees, the whole community did not contain one individual of taste, to appreciate the legacy, I imagine the legatees themselves would prove competitors to each other, to the extent of the value they set on it; and that neither would suffer himself to be deprived of it, until he received a price at least as gratifying.

I must, therefore, conclude in favor of the plaintiff's construction of the will.

It is ordered and decreed, that the defendants do deliver up the slave, George, the subject of this suit, to the commissioner, who shall, at Sumter court-house, on the first Monday of the next month after he shall have received him, or on the first convenient sale day thereafter, after having given at least fifteen days' public notice thereof, proceed to sell him, on a credit of one year, taking bond with good personal security, and a mortgage of the slave, to secure the purchase money. That upon the collection of the proceeds of the sale, the one half thereof be paid to the plaintiff, to be held by him, subject to the same limitations and conditions as those upon which the said slave

was bequeathed to him by the will of John B. Fraser; and that the other half thereof be paid over to the defendant, Thomas Boone, in right of his wife, Jane B., to be held subject to the same limitations and conditions as those on which the said slave was bequeathed to the said Jane B., by the will of the said testator.

And it is further ordered and decreed, that the said Thomas Boone do pay the costs of this suit.

From this decree an appeal was taken.

*W. and C. Mayrant*, for the appellant.

*Blanding, contra.*

The following opinion of the court of appeals was delivered by

JOHNSON, J. I have entertained very grave doubts about the leading question in this case, and I confess that the very able argument of the chancellor, in support of the view which he has taken, has, in some sort, shaken the confidence in the early and abiding impression made on my mind, by the maxim of Lord Coke, that "the first grant and the last will, is of the greatest force." The question, so far as I know, is open in our own courts; and the great diversity of opinion on the subject, leaves the court at liberty to adopt that rule which is most consistent with sound policy, and the general principles of law. The annotator of Lord Coke says, "that there is great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold, with Lord Coke, that the second devise revokes the first: Plowd. 541, note; others, that both are void on account of repugnancy: Ow. 84; but that the opinion of the greatest number of authorities is, that the devisees shall take in moieties:" Co. Lit. 112, b, note 144.

The question is simply one of construction. What did the testator intend? and the difficulty consists in the selection of the proper rule. That adopted by the chancellor has for its support apparent equity; but that is opposed, according to my view of it, by the consideration, that in the universal application, inequality would be produced. To illustrate this, I would take the case put by the chancellor, of the family picture, and suppose that it had been given in one clause of the will to a stranger, and in another to a near and much valued relation. In the canvas itself there is no intrinsic value, and if the stranger takes the entire thing, he gets nothing of value—if the relative, he gets that which to him is invaluable—no price would

purchase it. If it be sold for partition, the stranger takes advantage of the better feelings of the relative, and forces him to pay a great price for the one half of that which would be worth nothing to the stranger. And the same inequality would arise, in a greater or less degree, in the bequest of almost everything incapable of a partition in specie.

In resolving a question of doubtful intention, the court ought to adopt that conclusion which is the most reasonable and probable; and I think I may refer to the experience of every member of the profession, to support me in the position, that no case has occurred, in which, judging from extrinsic circumstances, a testator intending to divide his property between two or more, has given the whole to each severally. The terms necessary to express the intention are so commonplace and familiar, that no testator or scrivener, however ignorant or illiterate, could be at a loss for them—and when that was intended, it would be expressed in some form or other. Whilst, therefore, we are unable in cases of inconsistent devises, to fix with certainty the meaning of the testator, it may be affirmed with great confidence, that he did not intend that the devisees should take equally.

This view tends very strongly to the conclusion, that both ought to be rejected, on account of their repugnance; and yet it is certain that the testator intended to dispose of the thing devised, and here the rule of Lord Coke is most opportunely introduced. Not that it furnishes a certain guide to the intention of the testator; but valuable on account of its simplicity and the facility of its application; and it certainly loses nothing of its force and authority by Lord Hardwicke's dissent to the reasoning of the modern cases opposed to it, in *Uhlrich v. Litchfield*, 2 Atk. 374.

There is another consideration which very strongly inclines my judgment in favor of this rule. It has been, as before remarked, fixed in my mind, by very early impressions. I believe, too, that it has been the current opinion of the profession, and I think that is the understanding of the community. One case of the sort has occurred within my own observation, which was precisely like this (inconsistent bequests of a negro), and was adjusted by this rule; and it is not improbable that many others have occurred, and have not been brought into litigation on account of the supposed propriety of the rule.

It is therefore ordered and decreed, that the decree of the

circuit court be reversed, and that the complainant's bill be dismissed, with costs.

O'NEALL and HARPER, JJ., concurred.

IF TWO PARTS OF A WILL ARE WHOLLY IRRECONCILABLE, the subsequent part is to be taken as evidence of a subsequent intention: *Covenhoven v. Shuler*, 21 Am. Dec. 73.

## STONEY v. SHULTZ ET AL.

[1 HILL CH., 465.]

**A SHERIFF ASSUMING TO ACT VIRTUTE OFFICII**, warrants that he is possessed of such authority, and if not authorized, is liable to persons who have suffered damage, from steps undertaken under the belief that he was. So a sheriff is liable to purchasers at a sale assumedly made under proper authority, from a court which does not in fact exist.

**TO AVOID CIRCUITY OF ACTION WHERE PERSONS ARE LIABLE OVER AMONGST THEMSELVES**, the responsibility of those last to be charged being secured by mortgage of their property or judgment lien thereon, the court will order the sale of the premises, and the payment of the necessary proceeds to the first claimants.

**THE AMOUNT PAID FOR A RELEASE OF A JUDGMENT LIEN** will be credited as a payment on the judgment, though paid by a stranger, and though the property released was not covered by the lien.

**A MORTGAGEE, AFTER CONDITION BROKEN**, both at common law and under our statute, after notice to the tenants in possession, may demand of and collect from them their accruing and past due rents.

**A SHERIFF IS THE PRIVATE AGENT** of the mortgagee, and passes, by his sale, the estate of the latter in the land, though professedly the sale is by virtue of the proceedings in a foreclosure suit, if this assumed authority is insufficient, and if the sheriff has acted in bringing on the sale at the instance of the mortgagee.

**A SALE OF LANDS UNDER PAROL AUTHORITY** is confirmed, by an admission of the authority by the principal, in his answer to the bill in equity, in which the transaction is relied upon.

**LOTS SOLD WHILE COVERED BY THE LIEN OF A JUDGMENT** against the vendor, or of a mortgage given by him, are in the hands of the vendees, liable to the discharge of the liens in the inverse order of their purchases; the last sold first liable, etc.

**A DECREE FOR THE SALE ON CREDIT OF MORTGAGED PREMISES** does not violate the obligation of contracts.

**PUBLICATION OF NOTICE TO CREDITORS** to come in and prove their demands, after a final decree for the sale of premises, ordered by the court for the purpose of raising a fund for the satisfaction of such demands, is unnecessary where there has been ample notice before the decree of sale was rendered.

**THE MORTGAGEE, AFTER CONDITION BROKEN, IS ENTITLED ONLY TO THE GROUND RENTS**, and not to the enhanced value of rents caused by the improvements put upon the land by the persons in possession from whom the mortgagee seeks a recovery.

**BILL** in equity. In May, 1823, Henry Shultz purchased from W. Brooks, commissioner in equity, the Leigh tract of land. To secure the purchase money, the tract was mortgaged back for fifteen thousand five hundred dollars. In 1824, the first mortgage being unpaid, Shultz further mortgaged the tract to one Snowden for thirty-six thousand dollars. Snowden soon after failed, and assigned this mortgage, among other effects, to Stoney and Magrath, in trust for his creditors. In 1825, Shultz sold, at public sales, certain lots of the Leigh tract, that lay within the town of Hamburg; the sales were made at various times, during the months of January, February, and March, and at them many purchasers bought. In the meanwhile the Brooks mortgage was yet unpaid, and finally, after all the events before mentioned had taken place, suit was begun at law on Shultz's bond, and judgment was obtained thereon. By consent, an order of sale of the premises was made, directing that the sale of the premises be on credit, but directing the title deeds to be retained, in order to secure the payment of the purchase money, and that, should this be not paid when due, there should be a second sale for cash. At the sale on credit, Shultz purchased, but failing to pay anything, a resale of the land was made by the sheriff, acting under directions of Brooks. At this sale the land was purchased by one Williamson, acting in joint behalf of himself, Stoney, Magrath, Fitzsimons, and Breighthaupt. The purchase money paid was applied in satisfaction of the mortgage of Brooks and of a judgment held by one Moore against Shultz.

Certain tenants on the land attorned to Williamson, while others refused. Against the latter ejectment was brought. Plaintiff eventually suffered a nonsuit therein, it being held that the sale under which he claimed was irregular and void. Soon after, Williamson died, and his will was proved by Stoney and Magrath. Shultz also about this time assigned in trust for his creditors, and took the benefit of the insolvent act. Harrison, his assignee, at first refused to act, but finally, after appointment by the court as trustee jointly with Boyce, both acted in that capacity.

While affairs were in this condition, Snowden, Magrath, and Stoney filed a bill against Shultz, Harrison, and the purchasers from Shultz, praying that Shultz be restrained from suing the tenants in possession of the land; that an account be taken of the incumbrances covering the land, and this should



be sold to satisfy Snowden's mortgage. Boyce was made party to this bill after his appointment as trustee.

Stoney, Magrath, Breighthaupt, and Fitzsimons afterwards filed other bills, seeking relief against Brooks, Shultz, Harrison, Boyce, and Shultz's vendees, which, together with the preceding bill, and with the answers filed, were ultimately all treated as one suit, and tried together. In these bills plaintiffs set out that the money paid by Williamson at the mortgage sale had been applied to the Brooks mortgage and the Moore judgment, and that therefore they should have the benefit of the mortgage and judgment, as it had been held that they took nothing from their purchase. Further, they stated, that prior to the year 1825, the time of the purchases from Shultz, the tract in controversy was bound by judgment liens of many judgments recovered against him; that the land was held subject to the mortgages and these liens, and that its value was not adequate to their discharge. They averred that a large amount of these judgments was in the hands of Fitzsimons, assigned to him in trust for creditors. They prayed that the purchasers be restrained from suing the tenants in possession; that receivers be appointed for the lots purchased, and that the receivers be held to account for the rents and profits.

The injunction was granted, and Harrison and Boyce were appointed receivers for all lots other than those in the actual possession of the purchasers. Brooks answered, insisting that he was not a proper party to the suits; otherwise he was willing that the benefit of his mortgage be given plaintiffs. Harrison and Boyce were willing to perform any decree of the court. The purchasers answering, insisted that portions of their lands were not bound by the Snowden mortgage, either because not embraced in the land covered by it, or else because at the time of their purchase of said portions, Snowden was present and assented that the purchasers should be held free from the lien of his mortgage, and that although this consent was after the time of his assignment, yet that at the time the assignment was not known, and besides Snowden had his assignee's authority to give such consent. They contended, that the case stated in the bills did not warrant setting up the Brooks mortgage and Moore judgment in favor of plaintiffs. The judgments in the hands of Fitzsimons, they stated to have been obtained upon "bridge bills" issued by the bridge company, at a time that Shultz was a partner therein; but they averred that Fitzsimons had lost recourse against the private property of the

partners because of the fact that he had released the partnership property from the lien of his judgments. They also alleged fraud in the manner in which these judgments were acquired, and asserted that they were kept alive only through fraud, having been in point of fact long discharged. Defendants prayed affirmative relief in the shape of compelling plaintiffs to pay them rents and double rents in the place of those that they were debarred from collecting by the injunction issued.

Before a hearing a commissioner was appointed to determine the amount of Shultz's debts. In accordance said commissioner advertised for Shultz's creditors to come in, and before the hearing made a report of the debts so determined by him, and of the assets that might be applied in their discharge. There were exceptions taken to the report, immaterial to notice. The facts of the alleged release by Fitzsimons were these: The bills upon which the judgments were obtained were issued by the bridge company, at a time when Shultz was a member thereof. Subsequently Shultz ceased to be a member, and the partnership then consisted of B. & J. McKinnie. This new firm mortgaged the bridge, the principal property of the company, to the bank of Georgia, for ninety-eight thousand dollars. Upon a bill to foreclose the mortgage, filed by the bank, Shultz and Breighthaupt, a holder of bridge bills, filed a bill in the federal court, against the bank and the McKinnies, praying an injunction against further proceedings in the foreclosure suit, as they insisted that the bridge was primarily liable to the discharge of the bridge bills. This bill was ultimately dismissed for want of jurisdiction, but previous thereto it was agreed by all parties that the bridge be sold and the funds realized be deposited in the bank of Georgia to await the determination of the suits. At the sale the bank bid in the bridge for seventy thousand dollars. Under the same proceeding five thousand dollars was paid over to Breighthaupt by the bank, he giving security that he should hold subject to the order of the federal court. After the bill was dismissed, Shultz, the holder of bridge bills, bridge bill judgment, etc., still setting up claims to the bridge, the bank found it expedient to compromise their claims, and in so doing paid Fitzsimons ten thousand dollars for the release of the bridge from the lien of his judgments.

The chancellor decreed that the tract was subject to the bridge bill judgments, and the Snowden mortgage; that the Brooks mortgage and Moore judgment were incumbrances subsisting in favor of plaintiffs, as representatives of Williamson;

that plaintiffs should account as mortgagees in possession, but that a portion of the rents be allowed the purchasers for their improvements; that the land be sold at a credit to fulfill the purposes of the decree; that the case be referred to a commissioner to take accounts; that Breighthaupt should account for the five thousand dollars received by virtue of the proceedings in the federal court.

Both parties appealed upon grounds that appear from the opinion.

*Blanding and Preston, for the defendants.*

*Pettigru, contra.*

JOHNSON, J. Both parties have appealed from the decree of the circuit court, and the grounds stated open for consideration most of the leading points in the cause. I propose to consider them in the order in which they are put down in the brief, beginning with those of the defendants, as going more directly to the merits.

The first and second may be resolved into the general question, whether the mortgage to Brooks and Moore's judgment can be set up as a lien on the Leigh tract of land generally, and more particularly, whether the mortgage can be set up in opposition to the rights of those who purchased lots from Shultz before the mortgage was ordered to be foreclosed: 1. The very able argument of the chancellor in support of his views of this question, vindicates, very satisfactorily, his order setting up those liens. I will notice, however, some of the arguments which have been urged by the counsel in support of this ground of the motion with great apparent confidence. The most prominent are, first, that Williamson having purchased with notice that the sale was premature and irregular, is not entitled to relief: secondly, that all that Williamson can claim, is to be put in the same situation that he would have been if the sale had been regular and valid, and that according to this rule, he would only be entitled to have the mortgage set up against the unsold lands, because the law court had no authority to order the foreclosure as to the lots which had been sold.

1. The general rule very clearly is, that there is no implied warranty in sales made by a sheriff or other ministerial officer in his official capacity, but that applies exclusively to the quality and property of the thing sold. Thus in a sale made by a sheriff of goods taken in execution, there is no implied warranty, on the part of the sheriff, that the goods are intrin-

sically worth anything, or that the defendant has any property in them. He only undertakes to sell the interest which the defendant may happen to have in the goods, in the condition in which they are. But the principle does not apply to cases where the sheriff or other officer assumes an authority where none is given by law. It will hardly be questioned, that if a sheriff induce persons to purchase at his sales, by pretending that he has the authority of law for the sale, when in truth he has not, the purchaser must be without remedy. It is a fraud for which he would be responsible, and the principle equally applies when he acts upon a void authority. In any case the sheriff is bound to show that he is legally authorized to do that which he assumes to do *virtute officii*. The case in hand does not entirely depend even on that rule. In his deed to Williamson, the sheriff recites the order of foreclosure of spring term, 1827, the sale on the first Monday in June, thereafter, and the failure of the purchaser to pay the purchase money according to the terms of the sale, the advertisement of the subsequent sale, and the sale to Williamson—and in pursuance thereof he undertakes to convey. Here there is an express declaration on the part of the sheriff of his authority to sell, and although it is stated by way of recital, he is as effectually estopped as if it had been in the form of an express covenant: Com. Dig. Estoppel, B, 5; Bull. N. P. 298. In effect it is a covenant on the part of the sheriff that he has authority to sell, and the same thing is implied in every sale he makes. Conceding then, Williamson had notice of the circumstances from which the want of authority to sell has been deduced in the case of *Williamson v. Farrow*, here is the guaranty of the sheriff against the consequences. One of two persons who are equally confident of their title to the same article of property, undertakes to sell it to a third, who knows all the circumstances, and covenants to warrant the title—did any one ever yet suppose that he would not be bound by that warranty? In principle this is that case. The sheriff, supported by Brooks the mortgagee, undertook to sell the land; Shultz denied their authority, on the ground that the time for the payment of the money had not passed. Was Williamson obliged to sit in judgment on this controversy, and decide at his peril? Might not the sheriff covenant for his authority to sell? And is he not bound?

2. The authority of the lower court to order the foreclosure of mortgages on lands is derived from the act of 1791, and in that act there is an express proviso, that nothing therein cou-

tained shall extend to any suit or action then pending, "or where the mortgagor shall be out of possession." But this I regard as wholly unimportant to this branch of the case. The complainants do not ask to have Williamson's purchase carried into effect. That was adjudged against him in *Williamson v. Farrow*—he took nothing by the purchase. But upon the principle before laid down, they have the right to ask to be reimbursed the sum which Williamson paid. It is money paid on a consideration which has wholly failed, and upon the plainest principles of common sense and common honesty, they are entitled to recover it back. Primarily the sheriff is liable, because it was he who received the money and guaranteed his authority to sell. Upon the same principle Brooks too is liable, for the sheriff acted under his authority and for his benefit, and paid the amount of the mortgage to him. It seems, also, that Brooks received it in the capacity of commissioner in equity, and in his answer he states that he had paid it over to the persons entitled, and against them he has an unquestionable remedy. The same thing may be said of the amount paid on Moore's judgment, and the object of this bill is not as the argument supposes—a claim on the part of the complainants to be subrogated to the rights of the mortgagee and the judgment creditor, but that the multiplicity and circuity of action which would be necessary in a court of law may be avoided and justice done to all the parties at once, that the lands may now be sold to satisfy the mortgage and judgment, in relief of the mortgage and judgment creditor—and it may be asked what wrong is done to the defendants by this mode of proceeding? In the end, the money due on the mortgage and judgment must be paid, and that is all that is claimed now.

The third and fourth grounds of the defendants' motion call in question the legality of the order of the circuit court setting up the judgments on the bridge bank bills assigned to the plaintiffs, particularly in opposition to the rights of the lot owners who purchased from Shultz. The argument in support of these grounds assumes that these judgments were a lien on the bridge at the time the defendants (the lot owners) purchased from Shultz, and that the release of it by Paul Fitzsimons, operated as a fraud on them, as it operated to exempt a fund primarily liable, and threw the burden on the individual property of Shultz.

If this assumption was supported by the facts, I should be inclined to think with the defendants' counsel, that the judg-

ment creditors ought to be left to their remedy against that fund, or having released it, they are without remedy. The judgments were for partnership debts. The bridge according to this allegation was partnership property and liable to the judgments. The defendants, the purchasers of lots from Shultz, claim that the judgment creditors may exhaust that remedy before they resort to the property purchased by them. I need not resort to authority to show that a judgment creditor will be compelled to resort to the property of the debtor to satisfy his judgment in relief of property purchased from him by a stranger; and this as I understand it, is the case made by the facts assumed. They are not however supported by the proof.

The property in the bridge was in John and Barna McKinnie, who constituted at that time the bridge company. They mortgaged the bridge to the bank of Georgia, on the tenth of June, 1819, to secure the payment of ninety-eight thousand dollars; and on a bill filed in the federal court of Savannah, to which the judgment creditors and Shultz, the bank of Georgia and John and Barna McKinnie, were parties—an order was obtained by consent that the bridge should be sold and the money brought into court. On the twenty-eighth of November, 1822, it was accordingly sold and purchased by the bank at seventy thousand dollars, being twenty-eight thousand dollars less than the amount of their mortgage, and the proceeds were, by the order of the court, deposited in the bank. That bill was afterwards dismissed for want of jurisdiction, but if the bridge company had at that time any property in the bridge, it was divested by the sale. If we are referred to the fund in bank arising from the sales of the bridge, that is swallowed up by the prior lien of the mortgage.

An entry made in the books of the bridge bank, pledging the bridge, amongst other things, for the redemption of the bills issued by the bank and on which these judgments are founded, is set up by the defendants as a lien on the bridge, as paramount to the mortgage, being anterior in point of time. This is well answered in the circuit court decree. There was no evidence that the bank of Georgia had any notice of this entry. In itself there was nothing to divest the bridge company of the property in the bridge. Conceding that it possessed all the requisites of a legal and binding contract, from the nature of it, the right and power of the disposition of the bridge must have been reserved to the bridge company; for that was the only

mode in which they could make it available in the payment of the bills, and they alone are responsible for the disposition they made of the proceeds. The sums paid to Shultz and Fitzsimons can not be otherwise regarded than as the price of peace. The sum received by Fitzsimons was properly ordered to be credited on the judgments. It was paid on that account, and although by a stranger, supposing it even voluntary, it is *pro tanto* a satisfaction.

The fifth and sixth grounds of the defendant's appeal, object to the amount and disposition of the rents made in the circuit court decree, and may be conveniently considered in the same general view.

At the common law, there is no question that as mortgagee, Brooks was entitled to the possession of the land after the condition of the mortgage was broken, or that he might have maintained a possessory action against the mortgagor or any one else in possession, and was entitled to enter upon a vacant possession; and if a mortgagee give notice to the tenant in possession, that the money secured by the mortgage has not been paid, the tenant is bound to account with him not only for the accruing rents but for the rent in arrear; and the mortgagee may resort to the summary remedy by distress, and in *Moss v. Gallimore*, Doug. 279, Lord Mansfield says, that he considers "this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor." Thus stood the common law, and according to this rule there is no question about Brooks' right to receive the rents after notice to the tenants that the money due on the mortgage was unpaid.

We are next to inquire whether the act of assembly of 1791, has made any change in the common law in this respect. That act seems to have been intended principally to give jurisdiction to the law courts, to enable them in a particular case (the case where a judgment has been obtained against the mortgagor by a third person), to foreclose the mortgage and bar the equity of redemption. But it goes on to declare, that "the mortgagee shall not be entitled to maintain any possessory action for the real estate mortgaged, even after the time allowed for the payment of the money secured by the mortgage is elapsed, but the mortgagor shall be deemed the owner of the land, and the mortgagee of the money lent or due;" and then follows a proviso that nothing therein "contained shall extend to any suit or action then pending, or when the mortgagor shall be out of possession." A doubt has been thrown out, whether this

proviso extends to the declaration, that "the mortgagor shall be deemed the owner of the land," and hence it was intended to be concluded, that the mortgagee could in no instance and under no circumstances maintain a possessory action, and could not therefore be entitled to rents and profits. The proviso follows the declaration in the same clause, and I can not conceive of language more appropriate than that used to express the idea that not only that declaration but the whole act should be inoperative when the mortgagor was out of possession. And it has received that construction in the case of *Durand v. Isaacks*, 4 McCord, 54, in which it was ruled that the law court had no jurisdiction in cases of mortgages when the mortgagor was out of possession; and Judge Nott, in delivering the judgment of the court in that case, has given the most satisfactory reasons why the exception ought to have been made. I take it, therefore, as clear, that Shultz, the mortgagor, being out of possession, the rights and powers of Brooks as mortgagee, in respect to the purchasers of lots in possession under Shultz, must be determined according to the rule of the common law, and according to that he had a right to receive and retain the rents, having given notice of the mortgage to the tenants in possession.

The question then arises whether Williamson and the plaintiffs, his representatives, are entitled to the same rights and immunities.

According to the preceding view, as between Brooks, the mortgagee, and the assignees of Shultz, tenants in possession, the legal estate was in Brooks, subject to the equity of redemption. He had therefore a right to convey the land itself, subject to this equity, or he might have assigned the mortgage, with or without having entered upon and taken possession of the premises: *Matthews v. Wallwyn*, 4 Ves. 118; *Clute v. Robison*, 2 Johns. 612. The sheriff, under the authority and by the direction of Brooks, did make a deed, by which he undertook to convey the fee in these lands to Williamson unconditionally; and although that was a greater interest than Brooks had in the land, the minor interest, whether of the legal estate subject to the equity of redemption, or the right to assign the mortgage whereby the legal estate would pass, was necessarily covered by it. In this view the sheriff must be regarded as the private agent of Brooks, and not as acting in his official capacity; and if it be objected that his authority from Brooks was by parol, and void under the statute of frauds, it is an answer, that the facts are admitted by Brooks in his answer to this bill—a con-



firmation of the act. Williamson was therefore entitled to all the rights of Brooks, and necessarily to the rents.

The seventh and last ground of appeal, on the part of the defendants, complains of error in the decree of the circuit court, in not directing the sale of the lots in the order in which they were conveyed by Shultz, beginning with the last, and proceeding according to the order of the dates, to the first.

The counsel for the complainants have consented to a modification of the decree, according to this suggestion. I do not regard it however as depending entirely on the concession of counsel. As between the complainants and defendants, the whole is equally liable, but amongst the defendants themselves, there is an equity which ought to be kept in view. Knowing of the mortgage and judgments, the first purchasers must necessarily have looked to the residue of the land as a security for the satisfaction of them. Every subsequent purchase diminished the amount of this security, and operated as a fraud upon the first purchasers.

I shall now proceed to notice the grounds of appeal taken, on the part of the complainants.

1. The order that the land shall be sold on a credit of twelve months, as to three fourths of the purchase money, is complained of as a violation of the obligation of contracts.

This order is in conformity with the practice of the court of chancery, both in this country and England. In the act of 1791, before referred to, authority is expressly given to the law courts to give time for the payment of the money due on the mortgage, and a credit on the sales. It is founded, as I understand it, upon the principle of equity, that the mortgagor has a right to redeem, at any time, until he is bound by the presumption arising from lapse of time; according to the construction of the contract, he has the right to redeem at an indefinite period, and it follows necessarily, that a sale on a limited credit is no violation of the obligation of that contract. I think, also, that it might be justified on the footing of a *lex fori*, for its use is universal, and coexistent with the courts of chancery over mortgages.

2. Notice to the creditors of Shultz to come in and prove their demands, has been already twice given—once according to the answer of Boyce, by the commissioners appointed under the order of the court, and once under the order of the court, and I have heard no suggestions that there are any yet to come in; and I presume that the order for the publication of further

notice, and allowing time for them to come in, was made through abundant caution, and without the knowledge of the fact that notice had already been given. If there are other creditors, it is their own fault that they have not come in and proved their debts. They are not therefore entitled to the indulgence of the court, nor ought the complainants to be longer delayed on that account—in this respect therefore the decree must be reformed.

3. The decree of the circuit court directs that the rents of the lots which have been sold by Shultz, and improved by the purchasers, should be so apportioned that Williamson's executors should take only the ground rent; and by the complainants' third ground it is understood that they claim to be entitled to the rents, as increased by the improvements.

There is apparently much equity in this order, and I am disposed to think it may be vindicated upon principle. There was no obligation on the part of Shultz to improve the lots, nor were the purchasers from him bound to do it. The mortgagee was, by the contract, entitled to the land and the rents accruing from it, in the condition it then was, and no more. The improvements made did not diminish, but increased the value of the rents, regarding them merely as ground rents, and according to the principle of the order, the executors of Williamson are allowed this increased value. In doing justice to the lot owners, even more than strict justice is meted out to Williamson's executors.

4. The fourth and last ground is conceded by the counsel for the defendants—so much of the decree therefore as directs that Breighthaupt shall account for the five thousand dollars which he received under the order of the federal court, must be reversed.

It is therefore hereby ordered and decreed, that so much of the decree of the circuit court as directs that the commissioner shall advertise in the gazettes, for all creditors who have not done so, to render in their demands by a day fixed by him—and so much thereof as directs a reference to ascertain whether Breighthaupt received the sum ordered to be paid to him by the federal court, and what disposition he made of it, and what proportion of it should have gone to the credit of those judgments; be, and the same is hereby set aside and reversed.

And it is further ordered and decreed, that in executing the order for the sale of the Leigh tract of land, the commissioner do first sell the lots and lands whereof Henry Shultz was

seised at the time he was admitted to the benefit of the "act for the relief of insolvent debtors," the lots separately, and the lands not divided into lots, either in a body or in parcels as he may judge most beneficial to all concerned; and next lots in the hands of purchasers, or so many thereof as may be necessary for the payment of all the liens established by this decree—reserving to Shultz's alienees the right of priority amongst themselves according to their deeds—the lots held by subsequent deeds to be sold before those held by prior deeds, and when two or more deeds have the same date, the commissioner shall himself determine the order in which the lots shall be sold, reserving to the owners of the lots sold, the right of contribution from the owners of lots that it may be unnecessary to sell, if such should be the case. And to enable the commissioner to carry this order into effect without delay, he is hereby authorized to require the owners of all lots to exhibit their title deeds or other muniments before him, at such time as he shall appoint—and if any difficulty should arise as to the order of the dates of the deeds, he will report the same to the circuit court.

And lastly, it is ordered and decreed, that the decree of the circuit court, so far as the same is not inconsistent with this decree, be, and the same is hereby affirmed.

O'NEALL and HARPER, JJ., concurred.

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THE PREVENTION OF LITIGATION under some circumstances forms a ground of chancery jurisdiction. To prevent multiplicity of suits where one has a right which various persons may controvert in different actions, equity will lend its aid and direct an issue to try the right: *Morgan v. Morgan*, 21 Am. Dec. 638.

MORTGAGEE SHOULD NOT BE CHARGED WITH RENTS which accrued from improvements that he himself has made: *Gills v. Martin*, 25 Id. 729.

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## KINLOCH, EX'R OF ALLEN, v. HAMLIN.

[2 HILL CH. 19.]

A BILL IN EQUITY WILL NOT LIE UPON ONE OF DEPENDENT COVENANTS in the absence of a showing by plaintiff of a performance, or of a valid excuse for the non-performance of the covenants incumbent upon himself.

A BILL FOR AN ACCOUNT BETWEEN PARTNERS will not lie for the breach of a particular stipulation of the articles of partnership, for which an adequate remedy at law by recovery of damages exists.

DISCOVERY NOT AN INDEPENDENT GROUND OF EQUITY JURISDICTION.—Equity will assist the jurisdiction of a court of law by requiring discovery in a proper case, but will not retain a bill seeking other relief, where the discovery sought is the only equity.

**BILL** for an account. Plaintiff's testator and defendant, by articles, agreed to enter into a partnership in the business of making and selling bricks, to continue ten years. At the end of three years Allen withdrew his quota of labor, etc. The brick-yard of the partnership had however been previously established on Allen's land, and still continued to be so. Moreover, the clay used in the making of the bricks was taken from Allen's land, and the wood used in the operation was cut from it. The other facts sufficiently appear from the opinion.

*Hunt*, for the appellant.

**EARLE, J.** (sitting for **HARPER, J.**) Whenever a party comes into a court of law, to claim damages for the breach of an executory agreement, containing mutual and dependent stipulations, he must show that he has performed his part; or that he has been ready and willing to perform, and has been prevented by the other party, or some other sufficient legal excuse for not performing. I apprehend a different rule can not prevail in equity. It is a rule of common sense and common justice, and therefore a rule of both law and equity. For the three years, during which the plaintiff's testator contributed his proportion of the labor, and otherwise performed his portion of the agreement, he is entitled to an account, as the chancellor has decreed. But in relation to the other seven years, as he has well remarked, "the claim for an account is an awkward one." He comes into equity with an ill grace, to claim compensation on a contract which he utterly renounced and repudiated, to claim an account of the profits of a concern which he forthwith abandoned when he supposed it would be a losing business. It may, however, have turned out otherwise; and he has no right to withdraw from the partnership. It is true, he had no right to dissolve the partnership, so far as the rights of the defendant were concerned, nor could he exonerate himself from his liability to others by any act of his own. But surely it was competent for him to abandon his interest in the concern, to forfeit his share of the profits; and I think he has done this, by refusing to perform, after the three first years, every stipulation contained in the agreement, by withdrawing every portion of the capital he was to contribute, except the wood and the use of the soil; thus depriving the defendant of all the benefit he might have derived from the use of that capital, and to that extent diminishing his profits. To allow him or his representative, the plaintiff, to claim an account and participation of the profits, would be,

as the chancellor expresses it, "to pay a premium for breaking a contract."

By this bill, however, compensation is further claimed, for the use and occupation of the land, and for the wood consumed in burning the bricks. And first in relation to the land merely, or the use of the soil consumed and occupied in the business.

[His honor here goes into an argument, which it is unnecessary to state, showing that according to the contract, the plaintiff is not entitled to compensation for the mere occupation of the premises, or the use of the soil; and then proceeds:]

Under the agreement, therefore, the plaintiff can claim no other compensation than that agreed upon, to wit, "fifty cents per cord for one half of the wood consumed," which Hamlin was to pay, and for this it is contended, that he is entitled to maintain this bill for an account and relief. I think not. It is not every agreement that constitutes a partnership, which, when broken, entitles the party injured to compensation or relief in equity. It is only for an account or settlement on dissolution, that the aid of that court is necessary; and this, not merely on the ground that they are partners, but because of the trust and confidence reposed, and the necessity of a discovery. But a court of law is generally competent to give adequate relief in cases of the breach of particular stipulations; it can not enforce specifically, but can compensate in damages. Partners may sue each other at law for the breach of any distinct and positive engagement contained in their agreement, as to account annually, or to adjust and to make a final settlement of the joint concerns on dissolution: then, a breach by one will vest a right of action which may be enforced at law upon the covenant, and adequate damages recovered: Gow on Part. 106, 107; 2 T. R. 483, and in note, "and the same rule applies to every other species of lawful covenant, by which partners reciprocally and severally bind themselves, *inter se*, to the performance of any particular act or thing." Where A. agreed to supply B. with the manuscript of a work to be printed by the latter, the profits of which were to be equally divided between them, it was held that B. might maintain an action against A. for refusing to supply manuscript after part of the work had been printed: Gow, 108; 2 Bos. & Pul. 131; Gow, 109; 2 Stark. N. P. C. 107; 3 Johns. Ch. Cas. 362 [*Duncan v. Lyon*, 8 Am. Dec. 513]. Under the agreement in question, the plaintiff's testator was entitled to maintain an action at law for the value of the wood consumed, at the rate agreed on, supposing the partnership to have con-

tinued; and there could have been no occasion to go into equity, if the defendant had accounted for the profits. It is a separate and distinct engagement, independent of the general liability to account, arising from the relation of partner. On a bill to account, if the partnership had continued, it is true that item or claim might have been brought in, on final settlement of the claims of each.

But the question is, can the plaintiff's testator, after having forfeited his claim to the profits, and his right to an account, maintain a bill for compensation under any part of the agreement? and for which, if entitled to any, he has plain and adequate remedy at law? According to the view already taken, he can not maintain this bill to account, except for the three years; and if he can not maintain this bill to account, on the ground of partnership, he can not maintain it on the ground of contract under the articles. The court can not, after the three years, allow him the aid of equity, to enforce one of the covenants or stipulations of an agreement, which he has renounced, and refused to comply with. He can not renounce and enforce at the same time. It would be contrary to all principle and all precedent. But setting aside the agreement, it is contended that he is entitled to be paid for the wood consumed, and although he might recover at law, if he knew the quantity, yet, as he does not, and the defendant does, he may maintain this bill. I think not. That would be a very pliable principle of equity jurisdiction. Without the agreement, he is entitled to the aid of equity in this, as in other cases where discovery is necessary in aid of the jurisdiction of the court of law. But this case does not stand upon that footing; nor can it be maintained now, for that purpose. This court will not now decide that the plaintiff can not recover at law, for that question is not necessarily before us. If the plaintiff thinks that his testator was entitled to compensation, under or without the agreement, for the wood consumed, let him bring his action at law on the express contract, or on a *quantum valebat*, and afford the defendant an opportunity to discount the damages he may have sustained in consequence of the testator's breach of all the covenants to be performed on his part.

JOHNSON and O'NEALL, JJ., concurred.

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UPON ONE OF DEPENDENT COVENANTS there can be a recovery only after showing of the other either performance or an offer to perform: *Bean v. At-*

water, 10 Am. Dec. 90; *Cassell v. Cook*, 11 Id. 611; *Castleberry v. Peirce*, 24 Id. 774.

ACTION AT LAW will lie for one partner against the other, for a breach of a covenant in partnership articles: *Duncan v. Lyon*, 8 Id. 513; *Rondeau v. Pedesclaux*, 23 Id. 467; see note to *Course v. Prince*, 12 Id. 649.

## GORDON, ADM'R, v. STEVENS.

[2 HILL CH. 46.]

LEGACY TO WIFE IS NOT REGARDED IN LIEU OF DOWER, in the absence of express provision, where the real estate subject to the dower is devised to trustees to sell, or with directions that the executors sell, in order to pay debts.

IDEM.—The wife is not required to elect between her right to dower and a legacy under her husband's will, unless the intent that she exercise such choice, appear from express provisions in the will, or by a necessary implication from its terms.

BILL in equity. The question in issue was, whether there was a case raised requiring the wife to elect between her right to dower and the legacy left her by her husband. By the first clause of the will, under which the question arose, the husband left his wife (present defendant) all the property which had come to him by her marriage. By the second clause, all his real estate was directed to be sold, and the proceeds, after payment of debts, were directed to be distributed equally among his children. The chancellor held the wife entitled alike to dower and legacy. Plaintiff appealed.

*Herndon*, for the appellant.

JOHNSON, J. The leading question, and that to which the grounds of this motion are principally directed, is whether the defendant is entitled to dower in the lands of her late husband, the plaintiff's testator.

The widow's right of dower is one with which the law invests her, and over which the husband has no control. He can neither dispose of it by contract in his life-time, nor direct the disposition of it after his death by will or otherwise. She can only be deprived of it by her own act or voluntary consent. The husband has, however, the unquestionable right to annex to the dispositions of his other property, by will, any condition he may think proper, which is not in itself against the law. He may therefore make it the condition of a legacy to his wife, that she shall renounce her dower or declare that it shall be in lieu or bar of her dower and if she accept it, must

necessarily so operate. It seems to be universally agreed, too, that although no such condition or declaration is expressed in the will, she will not be entitled to both the legacy and the dower, if retaining her dower would be inconsistent with the provisions of the will, and defeat the intention of the testator. But there has been much difficulty in establishing a rule of construction by which to ascertain the intention.

In *Lawrence v. Lawrence*, 2 Vern. 365, the testator gave to his wife a part of his personal estate and a part of his real estate, during her widowhood, and devised the residue of his estate to trustees for the payment of his debts and other legacies, remainder to his godson—and Lord Somers was of opinion that here was a plain intention that the legacy should be in lieu and satisfaction of dower, because the testator had devised all his other real estate to other uses, and decreed that the widow should make her election to take the legacy or her dower. But this judgment was afterwards reversed by Lord Keeper Wright, whose opinion was supported on an appeal to the house of lords.

In *Villa Real v. Lord Galway*, Amb. 682, the testator devised to his wife an annuity of two hundred pounds, and the bulk of his estate, real and personal, to trustees in trust; amongst other things to pay this annuity; and it was held by Lord Camden, that the widow was not entitled to both the legacy and her dower, but must elect: 1. Because to allow the claim of dower would disappoint the will. It puts the widow in possession, instead of the trustees who are to hold the whole and in trust for the widow as an annuitant. 2. Because the dower and annuity are inconsistent with each other.

The same rule is laid down in *Arnold v. Kempstead*, Amb. 466, and *Jones v. Collier*, Id. 730, in both of which the estate in which the dower was claimed, was charged with an annuity for the wife. These cases would seem to have established the rule that an annuity for the wife, charged upon the land in which she claimed to be endowed, was inconsistent with the right of dower, and that she could not have both; but in *Pearson v. Pearson*, 1 Bro. C. C. 292, Lord Loughborough was of opinion, that this was not conclusive, and that if the estate was sufficient to satisfy both the annuity and the dower, they could not be regarded as inconsistent, and Lord Thurlow expressed the same opinion in *Foster v. Cook*, 3 Bro. C. C. 347.

The same question is discussed by Lord Alvanley in *French v. Davies*. 2 Ves. jun. 572, and *Strahan v. Sutton*, 3 Ves. 249,



and although the judgment was not upon the point, there is an evident leaning in favor of the rule in *Pearson v. Pearson*, and the case of *Greatorex v. Cary*, 6 Ves. 615, was decided by Sir William Grant on the authority of *Foster v. Cook*. The subject came under the review of Lord Redesdale in *Birmingham v. Kerwan*, 2 Sch. & Lef. 444, and the rule which he deduces from all the cases is, that the intent to exclude the right of dower by a voluntary gift, must be demonstrated by express words, or by clear and manifest implication, and this implication must arise from some provision in the will inconsistent with the assertion of the claim. I refer also to the case of *Adsit v. Adsit*, 2 Johns. Ch. 448 [7 Am. Dec. 539], where all the cases are collated by Chancellor Kent with his accustomed ability—and after all, it may be well doubted, whether there is in England anything like a settled rule upon the subject, or whether indeed it can be reduced to certain rule. It is a question of intention, and that may manifest itself in such variety of form, that there would be great difficulty in laying down any rule which would meet every case that may arise. The prosecution of the inquiry is, however, unnecessary to the present case; for, as remarked by Chancellor Kent, in *Adsit v. Adsit*, all the cases, however irreconcilable in other respects, agree in this, that a devise of lands to trustees to sell, or with directions to the executor to sell, is understood to pass the real estate subject to dower, and that is precisely this case.

A legacy, according to the language of some of the cases, implies a consideration in itself, an adequate motive for the gift, and it will not be intended that the testator expected that the legatee should renounce any right in consideration of the legacy, unless it is so expressed either in direct terms, or by necessary implication. In this case, the testator gives to his wife, the defendant, all the property which came by her in marriage, and directs that his estate should be sold to pay debts and to provide for his children. He will be presumed to have known that the wife would be entitled to be endowed of his lands, and as he has not thought proper to annex to the legacy to her, the condition that she should renounce her dower, it is a fair and reasonable conclusion, that they should be sold subject to that right, and in this way the provisions of the will are rendered perfectly consistent.

It is stated in the brief, that the defendant has been in the exclusive possession of the lands from the time of the death of the testator, and the bill prays an account for rents and profits,

but no order of reference is made in the decree, nor does the decree make any order for the admeasurement of the defendant's dower; both these orders are rendered necessary by the result, and were omitted, I presume, from inadvertence. The executor asks the instruction of the court also in relation to his power to sell the lands under the direction contained in the will, and of this also, there can be no doubt.

It is therefore ordered and decreed, that the cause be referred back to the circuit court, and that it be referred to the commissioner, to ascertain whether the defendant is liable for rents and profits, and to what amount; and that a writ for the admeasurement of the defendant's dower in the lands whereof the plaintiff's testator died seised, do issue.

O'NEALL and HARPER, JJ., concurred.

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BAR OF DOWER BY DEVISE OR LEGACY.—Where, from the will, it necessarily appears that the widow can not have both devise and legacy, she shall be put to an election: *Hamilton v. Buckwalter*, 1 Am. Dec. 350. Where a legacy is expressed as being in lieu of dower, if the wife accept the legacy she will in equity be held barred of her dower: *Van Orden v. Van Orden*, 6 Id. 314; but at the same time, if the wife accept a legacy left her in lieu of dower, her right to an election between dower and legacy will not be barred, unless she took with knowledge of the consequences of her choice: *Adsit v. Adsit*, 7 Id. 539. A pecuniary legacy will not be considered in lieu of dower, unless it is expressly so stated to be, or unless the intent that it be in bar of dower can be derived by plain and manifest implication from the terms of the will: *Id.* Similarly in Louisiana, where the system of community property exists, a legacy by a husband shall not be intended as in bar of his wife's right to one half of the community property, unless it is so expressed in the will, or unless such meaning can be derived from the terms of the will by clear and manifest implication: *Theall v. Theall*, 26 Id. 501.

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## BELL v. COIEL.

[2 HILL OR. 108.]

DECLARATIONS OF ONE OF SEVERAL IN COMMUNITY OF INTEREST OR DESIGN relative to the subject-matter whereof the community exists, are admissible in evidence against the others; therefore, where a combination to defeat creditors by a fraudulent transfer exists, declarations of the grantor subsequent to the transfer are admissible against his grantees.

THE WIFE IS A COMPETENT WITNESS wherever the husband would be.

THE facts appear from the opinion.

*Clarke and Clinton*, for the appellants.

*De Saussure*, contra.

JOHNSON, J. Excluding altogether the evidence which is regarded as exceptionable in the grounds of this motion, and which was expressly reserved by the chancellor, we concur with him that the merits are with the plaintiff; and that might suffice for the case itself, but there are some questions of law arising out of it which deserve a more particular consideration, and I shall notice the circumstances only so far as may be necessary to show their application.

The plaintiff was the creditor of Alston Coiel, for a large amount, for which he had obtained judgment. A *ca. sa.* was issued, on which he was arrested and committed to jail, where he died insolvent; and the object of this bill was to set aside a bill of sale executed by him not long before his arrest to the defendants, his sisters, for ten negroes, on the ground that it was covinous and intended to defraud the plaintiff and others, his creditors, and to charge the negroes with the payment of his debts. To prove the fraud, Mrs. Terry (late widow of Alston Coiel), and who had formally released her interest in his estate, was sworn for the plaintiff. It appeared that during his confinement Alston Coiel had intended to render a schedule of his estate, with a view to apply for the benefit of the insolvent debtor's act, and the defendants being apprehensive that he would include these negroes in it, one of them (Elizabeth) entreated this witness to advise him against it, saying that witness would be as much benefited as herself—she did speak to him on the subject, and he stated in reply that the negroes were in truth his own—that defendants had never paid anything for them—that he had evidence which would show it, and would not swear a lie about it.

Two objections are raised to the admissibility of this evidence: First, that being declarations made after the execution of the bill of sale to the defendants, they were inadmissible: secondly, that the widow of Alston Coiel was an incompetent witness to prove his declarations.

1. The general rule certainly is, that the declarations of third persons are not evidence for or against the parties, nor will the declarations or admissions of a grantor or seller, made subsequently to the grant or sale, be received against the grantee or buyer, because, having been divested by the grant or sale of the thing granted or sold, neither his acts nor declarations can divest the rights which arise out of them. But where there is a community of interest or design in several, in relation to the same subject-matter, and that fact is clearly

established, the acts and declarations of one in reference to it, are received in evidence against the others. Thus the admissions of one partner in relation to the partnership concerns, are evidence against the others; so of the admissions of one of several joint makers of a promissory note that is not paid: so in *The King v. The Inhabitants of Hardwicke*, 11 East, 585, where Lord Ellenborough, recognizing the general rule that the admissions of one of several defendants in trespass is not admissible to prove that the others were co-trespassers, yet lays it down, that if they be established to be co-trespassers by other competent evidence, the declaration of one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to be combined together for the common object. Very many examples founded on the same principle might be drawn from cases of conspiracy, where the rule is (the fact of conspiracy being proved), the admission of one is evidence against all the conspirators: See Stark., pt. 4, p. 407, tit. Conspiracy.

Independently of the particulars before stated, the circumstances of this case create a very strong presumption that there was a combination between the defendants and Alston Coiel to defraud the plaintiff; but that presumption appears to me necessarily to grow out of the facts stated by Mrs. Terry. If the transaction was *bona fide*, how were the plaintiffs interested in Alston Coiel's including or not including those negroes in his schedule? What motive could they have had to induce his wife to practice upon him to prevent it, unless it was the consciousness that the transaction would not bear investigation when opposed by an honest purpose on his part? These circumstances sufficiently show the combination, and, according to the rule, his declarations were admissible.

2. In general, the wife can not be examined for or against the husband, or in any case to which he is a party, or in which he may be interested; and the rule is so imperious that it can not be dispensed with, even when the husband consents that she may be sworn against him: *Barker v. Dixie*, Cas. temp. Hardwicke, 264. The only exception allowed is in the case of personal violence done by the husband to the wife, when she is admitted from necessity: and in *Aveson v. Kinniard*, 6 East, 192, it is said *arguendo* that the dissolution of the marriage by divorce, or even death, will not absolve the wife from the obligation to preserve the secrets of her husband inviolate. But when the husband himself would be a competent witness, the

wife may be sworn, and if the party might insist on swearing the husband, and by this means obtain the truth, it would be straining the rule of policy too far to deprive him of the evidence of the wife, when that of the husband could not be obtained: *Williams v. Johnson*, 1 Str. 504; Stark. Ev., pt. 4, p. 709. Now, Alston Coiel stood indifferent between these parties, for although he was interested, his interest was equally balanced on both sides. If the plaintiff recovered, this would have been so much subtracted from his debt due to them, and he would have been liable to the defendants for the value of the negroes—if the defendants, then he would have been still the debtor of the plaintiff in the whole amount. He might, therefore, have been sworn, and consequently the plaintiffs are entitled to the benefit of the wife's evidence. Decree affirmed.

O'NEALL and HARPER, JJ., concurred.

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DECLARATIONS OF ONE OF SEVERAL IN COMMUNITY of interest or design admissible against the others: *Costello v. Cave*, *ante*, 404, and cases referred to in the note.

CASES  
IN THE  
SUPREME COURT  
OF  
TENNESSEE.

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YEATMAN v. WOODS.

[6 YERGER, 20.]

**PARTNERSHIP REALTY, ON THE DEATH OF A PARTNER, is not distributed as personal stock, but descends to the heirs.**

**BILL** by the heirs of a deceased copartner of the defendants under the firm name of Yeatman, Woods & Co., for an account and distribution, as personal stock, of certain realty held by the firm for partnership purposes. The question presented is stated in the opinion of Chancellor Reese, in the court below, which was as follows:

**REESE, Chancellor.** The question submitted to the court by the complainants and defendants, is, whether the real estate of the firm of Yeatman, Woods & Co. is to be considered and distributed as personal stock, as between the surviving partners, the heirs and the widow.

The progress of trade and manufactures, and a more complicated and artificial state of society, imposed, long since in England, upon the courts, the necessity of relaxing some of the stern features of the feudal system in reference to land. This was first shown as to the property in fixtures for the purposes of trade as between landlord and tenant, and then as between heir and executor; next, in relation to real estate, constituting the basis or substratum of a partnership business; till at length, notwithstanding the opposing judgments of Lord Thurlow and Sir William Grant, reported in 3 Brown Ch. 199, and 7 Ves.

453, and 9 Id. 500, the opinion seems to have been settled by Lord Eldon, and by the house of lords, not only that real estate owned by a partnership, and necessary to the carrying it on, shall be deemed partnership stock, and be treated as personalty, but that any real estate purchased with the partnership funds, and in the partnership name, shall be considered and treated in the same manner.

The American decisions on this subject have differed; some, as in the cases in 15 Johns. 159, and 11 Mass. 469, following the cases above referred to in 3 Brown Ch. 199, and 7 Ves. 453, and 9 Id. 500; and others, as the cases in 4 Munf. 316, and 7 Conn. 11, adopting the later decisions in England, reported in 1 Swans. 508, 521, and 2 Dow P. C. 242. Chancellor Kent, a very high authority on such a subject, in the third volume of his commentaries, p. 14, etc., strongly supports the correctness of the latter opinions. And indeed it would seem that the character of our pursuits, daily becoming more commercial, and requiring, from the great scarcity of capital, an aggregation of the capital of many, in companies, to carry on successfully important branches of trade; and the character, too, of our laws and institutions, which deprives that favorite of the feudal system, the heir, of most of his advantages, would present fewer obstacles than in England, to considering and treating real estate purchased with partnership funds, and used for partnership purposes, as personal stock. That it should be so treated, I incline to think, and would so decide, but for what is said in the case of *McAlister v. Montgomery*, 3 Hayw. 94, 95, etc. It is true, it was only incumbent upon the court, from the facts in that case, to determine whether a surviving partner could convey, in virtue of his survivorship, a good title to the entire real estate which belonged to the firm, and what is said beyond that may be regarded, perhaps, as *obiter*. But the court were fixing a construction upon the sixth section of the act of 1784, chapter 22, for the first time, and were, it would seem, unanimous; and it is safe and proper, therefore, that a subordinate court should yield its individual opinion. If the question were open, I should consider that the section referred to only directs that when the original agreement of partnership provides that the stock, real or personal, shall go to the heir, executor, or administrator, it shall go as provided for and where no such provisions exist, it shall be "accounted for in the same manner as partnership stock is usually settled between joint merchants or the representatives of their deceased

partners." The section in question is treating of real estate, and if the word heirs is used, so are the words executors, administrators, and assigns. But, as I have said, it is my duty perhaps to surrender my own opinion, and I do so.

By the very authority, however, of the case referred to on the main point of it, the surviving partners in this case would have the power, if it be desirable, to sell the real estate in question, unless the admission in the answer, that it is not necessary to do so in order to pay debts, should operate against it. And there are two grounds, if proper allegations were made in the bill, upon which this court might do so on behalf of the complainants: 1. If it were obviously for the interests of the complainants, who are minors. 2. If the property be of a character not to be partible between the claimants.

From the foregoing decree the complainants appealed.

*F. B. Fogg*, for the complainants.

*T. H. Fletcher*, for the defendants.

By Court, PECK, J. This court sees no reason to depart from the principle of the case of *McAlister and Montgomery*, 3 Hayw. 94, and therefore, adopts the opinion of the chancellor delivered in the court below.

The decree will be corrected only so far as relates to the mode of disposing of the estate, as the parties have submitted it to the court of chancery. The officer of that court, or a commissioner appointed for that purpose, should conduct the sale, especially as it may save a sacrifice of the estate by placing it in a condition that Woods might become a purchaser, which he could not do were he to conduct the sale. The cause will be remanded for further proceedings.

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DECEASED PARTNER'S SHARE IN REALTY HELD BY THE FIRM for partnership purposes descends to his heirs, and such realty is not distributed as personal stock: *Piper v. Smith*, 1 Head, 93, following the principal case. Caruthers, J., who delivered the opinion in that case, said: "This question was not free from difficulty in England, but the doctrine was ultimately settled there to be, that all real property owned by the partners, and used in carrying on their business, and all such as may have been purchased with the means, and in the name of the firm, should be deemed partnership stock, and treated as personalty. According with this are the American cases in 4 Munf. 316; 7 Conn. 11, and other cases; and the opinion of Chancellor Kent, in his 3 Com. 14, and subsequent pages, where the subject is fully treated. But on the other side, there are high and numerous authorities in that country, and in this: 3 Brown, 199; 7 Ves. 453; 9 Id. 500; 15 Johns. 159; 11 Mass. 469. It may be said that the weight of authority is, that it is to be regarded as stock, and should be so held if the question was an open one in this state. But as



early as the year 1816, in the case of *McAlister v. Montgomery*, 3 Hayw. 94; the act of 1784, c. 22, sec. 6, Car. and Nich. 417, was held to have settled this question in favor of the heirs of deceased partners. And again in 1834, in the case of *Yeatman v. Woods*, 6 Yerg. 21, the case was approved and followed. It is said these cases are not well considered, and should be reviewed. But an important rule of property having been thus settled, and so long acquiesced in, should not now be disturbed, even if we considered it originally wrong. It is easy to see the mischief and hardship that would result from shaking or unsettling fixed rules of property, in view of which men have acted and made investments for so great a length of time." The principal case is cited on the same point in *Barcroft v. Snodgrass*, 1 Coldw. 445, where it is held that nothing in *Yeatman v. Woods*, or *McAlister v. Montgomery*, or in the act of 1784, gives any support to an assignment made by surviving partners of an insolvent firm, of all the real and personal property of the firm for the benefit of creditors. It is cited also in *Solomon v. Fitzgerald*, 7 Heisk. 552, 555, where it is decided that surviving partners have power to sell and convey the firm realty without regard to its being necessary to pay the firm debts. In *Williamson v. Fontain*, 7 Baxter, 212, it is declared to be the settled rule of property in Tennessee, that the real estate of a partnership is regarded as personalty, for the purposes of the partnership; but that when not needed for such purposes, it descends like other realty to the heir, and that the widow can not treat it as personalty. Said Nicholson, C. J.: "It is not denied in the argument, that the current of decisions in Tennessee is that so much of the real estate of a partnership as is not needed for the payment of its debts, descends as realty to the heirs; but it is said that these decisions have been made, accompanied with such intimations of doubt as to their correctness, that the question may now be properly revived and reconsidered." Then, after referring to the reluctance expressed by Chancellor Reese, in the principal case, in following *McAlister v. Montgomery*, and to the remarks above quoted from the opinion of Caruthers, J., in *Piper v. Smith*, 1 Coldw. 93, his honor proceeds: "We think the soundness of these considerations has been recognized and acquiesced in ever since the case of *Piper v. Smith*, and that it should now be regarded as a fixed rule of property in this state, that the real estate of a partnership is held as personalty for the purposes of the partnership, but when not needed for such purposes it descends as other real estate."

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## KING v. COHORN.

[6 YERGER, 75.]

**RELATIVE CIRCUMSTANCES AND CONDITION OF PARTIES TO AN ALLEGED FRAUDULENT CONTRACT** should be considered in determining the question of fraud; as where one of the parties is an artful, shrewd business man, and the other an aged, ignorant, imbecile negro woman, and the contract is secretly made, and its terms not fully explained.

**CHARACTER AND SUBJECT OF THE BARGAIN**, as being such as no sane person would make, and no honest man would accept, may also furnish strong evidence of fraud; as, where an ignorant old negro woman was induced to sell a lot constituting her home, and her only property, for a wagon and part of a team, for which she had no use, and there were circumstances indicating that she thought she was buying the liberty of her husband, who was a slave.

APPEAL from a decree of the Davidson county circuit court refusing to set aside a certain agreement. The facts are stated in the opinion.

*W. Barrow and J. Rucks*, for the complainant.

*T. Washington and Thompson*, for the defendants.

By Court, GREEN, J. This a bill to set aside an agreement for the sale of a lot of land in Nashville, conveyed by complainant to defendant, on the ground that the defendant imposed upon the complainant, and obtained the deed for her lot by fraud.

In considering the testimony in this cause, it is important to take into view the condition and character of the parties. Not the moral character, but the mental, physical, and pecuniary condition of the parties; for fraud "may be presumed from the circumstances and condition of the parties contracting." What were these circumstances? The defendant was an artful, intelligent, keen, speculating man, and was a close trader. The complainant was a negro woman, ignorant, old, addicted to drunkenness, then in bad health, and necessarily imbecile, and possessing no other property than the lot in question. The contract was made in secret. The defendant did not cause the terms of the contract to be stated by the complainant to any person. He did not even himself state the terms in her presence to any one. She had then no other means of knowing what was in the writings, but as she might gather that information from hearing the papers read. An intention to act fairly would have prompted the defendant to have had respectable persons present in whose hearing the contract would have been plainly and minutely stated, so that it might be apparent complainant understood what she was doing.

But this was not done. Perfect silence, as to the terms of the contract, is preserved whenever the parties are in the presence of third persons. The writings are drawn by the defendant's son-in-law, in his own house, under his own directions and instructions, in the absence of complainant, who is then sent for, and without anything being said to her about the terms of the contract, the papers are read, and she is called on to execute the deed. It is not probable that she could have understood the import either of the deed or the bond; nay, it is almost certain that if the bond was not in accordance with her understanding of the contract, she could not have detected the imposition. Many white persons more enlightened than

this complainant, are unable to comprehend the import of technical instruments, by hearing them read only. It would betray an entire want of knowledge of the human character, were we to assume that this ignorant, imbecile woman, understood what she was doing, thus hastily called on, confiding doubtless in the white men around her, without any explanation in plain language which she could comprehend, and only hearing the papers read.

We will next consider the character of this contract; for fraud "may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make on the one hand, and such as no honest and fair man would accept on the other." Look at the nature and subject of this bargain. This old free black woman had a lot worth about four hundred dollars. Her husband was a slave belonging to the defendant, and worth about the same sum. Several of her neighbors had heard her say that she wanted to sell her lot for Edmund her husband. Whenever she spoke of selling her lot, the object was to get Edmund. She was, as the witness says, "wrapt up" in him. Her anxiety to get him was natural. Although they had on a former occasion disagreed, that had passed away, harmony was restored, and he was then sick at her house. Even the son-in-law of defendant says he heard her offer the lot to the defendant for Edmund. She could have sold the lot for four hundred dollars in money, and the defendant was willing to sell Edmund, who was not worth more. If the defendant traded for the lot at all, it would be natural for him to give Edmund.

But after all this conversation, all this natural anxiety to get Edmund, we find this old destitute negro woman giving her lot, her home and her only property, for a heavy wagon and less than half a team of inferior horses. No person had ever heard her speak of desiring to get a wagon and team. She could plainly have no use for them, but they would be an expense and incumbrance. The folly of making such a contract is apparent. No woman in her circumstances, if in her senses and not under delusion, would make it; and it may be confidently asserted that no honest and fair man would have accepted it.

When it is considered that the complainant desired greatly to trade for her husband; had never spoken of trading the lot for any other object; that she had refused to take for it four hundred dollars in money; that she was a negro, old, ignorant, and imbecile; that she had never been heard to speak of trading

for a wagon; that she had no means to purchase other horses for the wagon; that she could have no use for it, but on the contrary it must be a heavy expense and burden; that the contract was kept secret, never having been stated between them in the presence of witnesses; that the writings were drawn by a member of defendant's family, at his house, and under his direction alone, it is difficult to perceive how it is possible for the mind to resist the conclusion that the defendant was guilty of a most gross fraud. To resist these circumstances, the evidence of Hodges is relied on. He read the papers to her, and she admitted, when asked, that they were right. She was present at the valuation of the property, and chose one of the values; spoke of running the wagon to pay her debts, and appeared satisfied with the trade.

What occurred when the papers were executed, has already been noticed. Her choosing valuers and attending to the appraisement of the property, does not prove anything; for the trade having been made, and she having been put out of her house, she might have considered herself bound by it. The deposition of Hodges, too, is in several particulars in conflict with defendant's answer. His agency in the matter, his connection with defendant, and the character of his swearing, entitle his deposition to but little weight: 2 Ves. sen. 154; *Clarkson v. Hannay*, 2 P. Wms. 203.

The court is unanimously of opinion, that the decree be reversed, and that the contract be set aside, and the complainant be restored to her original rights.

Decree reversed.

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CIRCUMSTANCES INDICATING FRAUD AND IMPOSITION in a contract, coupled with mental weakness, when sufficient ground for annulling the contract: *Owings' case*, 17 Am. Dec. 311. See also the note to *Jackson v. King*, 15 Id. 351. Taking undue advantage of one's weakness or necessity, or the situation in which he is placed, is ground for equitable relief against a contract: *Crane v. Conklin*, 22 Id. 519. To take advantage of the necessity of a party is as bad as to take advantage of his weakness: *McCants v. Bee*, 16 Id. 610. Inadequacy of consideration is direct evidence of fraud where one of the parties to a contract was intoxicated at the time: *Crane v. Conklin*, 22 Id. 519.

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## ERWIN v. OLDHAM.

[6 YERGER, 185.]

EQUITY CAN NOT SUBJECT STOCK HELD BY A JUDGMENT DEBTOR in an incorporated company to payment of the judgment, after the return of an execution unsatisfied at law.

APPEAL from a decree of the chancellor dismissing a bill filed by a judgment creditor to subject his debtor's stock in the Nashville bridge company, to payment of the debt after a return of his execution unsatisfied.

*Thomas Washington*, for the complainant.

*George S. Yerger*, for the defendant.

By Court, GREEN, J. This is a bill filed by the complainant to subject stock in the Nashville bridge company to the payment of his debt due from defendant.

It is not pretended that there is any fraud or trust in this case to furnish a ground of equity jurisdiction; and the simple question is, whether this court has power to cause stocks, credits, and rights of action held by a debtor, without fraud, to be sold or converted into money, or transferred to the creditor in payment of his debt; we think it has not: and without entering into any reasoning on the subject, or review of authorities, we refer, as conclusively settling the point, to the case of *Donovan v. Finn*, 1 Hopk. 59 [14 Am. Dec. 531].

Our act of assembly of 1833, c. 11, makes ample provision upon this subject; but this bill being filed long before the passage of that act, can not be governed by it. Affirm the decree.

Decree affirmed.

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CREDITOR'S BILL TO REACH DEBTOR'S CHOSSES IN ACTION.—This subject is considered in the note to *Donovan v. Finn*, 14 Am. Dec. 542. As to a creditor's right to come into equity to subject property to the payment of his debt generally, see *Birely v. Staley*, 25 Id. 303, and other cases in this series cited in the note thereto. The statute of 1832, c. 11, referred to in the principal case, was passed in consequence of an intimation from the court on the argument of that case: *Ewing v. Cantrell*, Meigs, 376, and see the note thereto in Cooper's edition of Meigs. Prior to that statute, a creditor could not reach chosses in action of his debtor, unless there was some trust or fraud involved: *Ewing v. Cantrell*, Meigs, 376; *Graham v. Merrill*, 5 Coldw. 633; *Nichols v. Levy*, 5 Wall. 443. Said the chancellor, in *Lockhard v. Brodie*, 1 Tenn. Ch. 395: "The principles upon which *Erwin v. Oldham* and *Ewing v. Cantrell* are rested have been effectually changed by statute. Money may be reached in this court, no matter what fraudulent device may be resorted to for the purpose of hindering the creditor." The provisions of the act of 1832 have been incorporated into the present code of Tennessee. Section 4282 gives exclusive jurisdiction to the chancery courts to aid a creditor by judgment or decree to subject to the payment of such judgment or decree any property of the debtor which can not be seized on execution. Section 4283 provides that after the return of an execution unsatisfied, the creditor may file his bill to compel a discovery of stocks, etc., due to, or held in trust for, the defendant. Section 4284 provides for compelling payment or delivery of

such property and its subjection to satisfaction of the judgment. Section 4285 provides for the execution of proper instruments of transfer, and sections 4286 and 4287 relate to the lien given to the creditor upon the property to be affected.

## CARROLL, GOVERNOR, FOR THE USE OF DOWNS, v. BOSLEY.

[6 YERGER, 220.]

FUNDS HELD BY AN ADMINISTRATOR, WHO IS ALSO GUARDIAN of the party entitled thereto, upon a distribution, after the time has expired in which to settle the estate, are presumed to be in his hands as guardian, and the sureties on his administration bond are not liable therefor.

IF THE ADMINISTRATOR, IN SUCH A CASE, HAS WASTED THE ESTATE before the expiration of the time for settlement, that fact must be averred.

APPEAL in the nature of a writ of error from a judgment of the Davidson county court, overruling the plaintiff's demurrer to one of the defendant's pleas, in a suit on an administration bond. The case is sufficiently stated in the opinion.

*G. S. Yerger and F. B. Fogg*, for the plaintiff in error.

*E. Ewing*, for the defendant in error.

By Court, GREEN, J. This is a suit on an administration bond executed by Thomas Patterson (the administrator *de bonis non* of James P. Downs), and John Bosley, Caleb McGraw, and Isaac L. Crow, his securities. The defendant, John Bosley, pleaded separately that, before the time Patterson was appointed administrator of James P. Downs' estate, he had been appointed guardian of William Downs, for whose use the suit is brought; that he gave bond and security as guardian according to law, and that more than two years elapsed from the date of the administration bond before suit was brought; that, while Patterson united in himself both the office of administrator and guardian, he had in his hands all the assets which were of the estate of James P. Downs, which were left after the payment of debts, and that, by operation of law, the amount due him in right of his ward, was retained by, and vested in him as guardian.

The plaintiff demurred generally to this plea, and the only question in the case is, whether, as Patterson was both administrator and guardian, the law will presume he held the property and money of the estate, as guardian, after the expiration of two years from his appointment as administrator, although

he did no act by which to indicate in what character he held. The estate of James P. Downs came into the hands of Patterson as administrator. He was then clearly chargeable as such with the amount which was unadministered in the payment of debts. But as it was his duty to settle the administration in two years and pay over to the guardian, the law will presume he performed the duty, and, consequently, the presumption is that after the two years, he held the assets as guardian.

"If one has two capacities in which to take and hold, and takes and holds without any declaration in which capacity he does so, it shall be taken, he holds in that capacity in which he ought of right to take and hold." This rule is laid down by the supreme court of North Carolina in the case of *Harrison v. Ward*, 3 Dev. 417. But they say it does not hold in relation to money not identified and separated from other money by putting a mark on it. We do not perceive the reason for this distinction. The plea in this case avers that Patterson had in his hands, while both capacities were united in him, all the assets which belonged to the estate of James P. Downs, deceased, which were left unadministered in the payment of debts. He was then authorized by law, and it was his duty to retain the amount due to his ward from the estate. In the absence of proof to the contrary, we must presume he did so. If he had wasted the estate as administrator before the time at which by law it was his duty to settle up and close his administration, the case would have been altered, and that fact should have been replied. But here, it is averred, that he had the assets in his hands, and having the money so in his hands, the amount due his ward was satisfied by way of retainer, and by operation of law it was vested in him, as guardian, and so he no longer held as administrator: *Taylor et al. v. Deblois et al.*, 4 Mason, 131.

Judgment affirmed.

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EXECUTORS MADE TRUSTEES OF A FUND arising from the estate, having received the same in contemplation of law as such trustees, are liable for it only in that character and not as executors: *Jacobs v. Bull*, 28 Am. Dec. 72. The presumption is, where an executor is also a trustee entitled to a distributive share of the estate, and the two years allowed from the settlement of the estate have expired, that he holds as trustee merely; but this presumption may be rebutted: *Porter v. Moores*, 4 Heisk. 29, citing the principal case. But where the administrator is himself a distributee, the presumption, it seems, does not attach in his favor: *Ross v. Wharton*, 10 Yerg. 192. In that case Reese, J., said: "It is said that though for two years after administration granted, the administrator would be presumed to hold in that character, yet after two years the presumptions of law are reversed, and he is to be taken to have held as distributee. This legal postulate we do not

think is established by the cases referred to for that purpose: 4 Mason, 136; *Carroll v. Bosley*, 6 Yerg. 219. These were cases where the administrator having also become guardian, and being himself liable in both characters, his securities in the latter character, and not in the first, were held liable; not upon a presumption arising from operation of time merely, but from the act done, the assumption of guardianship and giving bond. It would be very unsafe, on the ground of such presumption, to permit a trustee receiving and holding property in that character, to denude himself of the trust by the supposed operations of his own mind and will, and without any positive act done to apprise all interested of such a change of character."

### DUKE v. HARPER.

[6 YERGER, 280.]

**TENANT IN POSSESSION UNDER A PAROL LEASE FOR TWO YEARS**, which is void by the statute of frauds, is a tenant at will or from year to year.

**TENANT IS ESTOPPED FROM DISCLAIMING** his landlord's title during the term.

**TENANT'S DISCLAIMER OF HIS LANDLORD'S TITLE** during the term, and claiming to hold for himself or another, works a forfeiture of his lease, and the landlord, at his election, may treat him as a trespasser, and eject him without a notice to quit, or continue to treat him as his tenant.

**ACTUAL OUSTER OF THE LESSOR BY HIS TENANT** creates an adverse holding by the latter, upon which the statute of limitations will run.

**ACTUAL OUSTER MAY BE INFERRED FROM CIRCUMSTANCES** which are matters of evidence for the jury.

**NOTICE TO THE LESSOR THAT THE TENANT DISCLAIMS HIS TITLE**, and claims for himself or another, is necessary before the statute will begin to run, where the length of time does not furnish evidence of ouster.

**REFUSAL TO PAY RENT TO THE LESSOR'S AGENT**, and a disavowal of the lessor's title, will not set the statute in motion until the lessor has knowledge of that fact, unless the agent is authorized to enter upon or sue for the land in the lessor's name.

**EJECTMENT** brought in Montgomery county circuit court. It appeared at the trial, among other facts not material to the point decided in the supreme court, that Harper, the defendant, entered into possession of the premises in March, 1821, under a parol lease for two years, from Duke, the lessor of the plaintiff. In February, 1822, Harper took a written lease from one Burton, disclaimed Duke's title, refused to pay rent to Tribble, Duke's agent, when called on for the same in the fall of 1822, and informed Tribble that he had taken a lease from Burton. There was no evidence that Tribble ever communicated to Duke the fact of Harper's disclaimer of his title and refusal to pay rent. Duke had removed to Mississippi in 1821, having given Tribble a power of attorney to collect the rent, and rent out the premises again. Harper paid rent to Burton



from the time of taking the lease from him, and to his grantee. The plaintiff demanded possession from Harper in December, 1827. The defendant introduced evidence tending to show that Burton's title to the premises was prior and superior to that of the plaintiff. The court charged the jury, that if Harper had disavowed Duke's title, and refused to hold under him for seven years prior to the commencement of this action, the statute of limitations had run, and the action was barred; to which the plaintiff excepted. Verdict for the defendant, and the plaintiff brought error.

*W. E. Anderson*, for the plaintiff in error.

*Clayton and G. S. Yerger*, for the defendant in error.

By Court, CATRON, C. J. In February, 1821, Harper took a lease from Burton, and proves he disclaimed Duke's title. But Duke resided in Mississippi, and had no notice of this disclaimer. Tribble, in the fall of 1822, was authorized by Duke to receive the rent from Harper for the year 1822, and at the commencement of 1823, rent the premises. Harper refused to pay the rent, and informed Tribble he disclaimed Duke's title. There is no evidence Tribble informed Duke of the fact. Tribble's agency did not extend to any control of the premises until the first of January, 1823. Duke could have no idea of the lease taken from Burton, and the adversary holding of Harper, until informed of the fact. The strongest presumption was the contrary.

To obviate these objections, it is insisted Harper was not the tenant of Duke. Duke rented to Harper by parol for two years, the term to expire with the year 1822. As a binding contract, this lease for two years was void, but still Harper went in under Duke, and was the tenant at will or from year to year of the latter. This is the condition of all who hold without any special contract with the landlord as to time. Such is the settled law of England: *Warren v. Fearnside*, 1 Wils. 176; and of this state: *Phillips' Lessee v. Robertson*, 4 Hayw. 158; S. C., 5 Id. 101. Harper then stood in the relation to Duke, as if he rented the premises for the year 1822. Could he, thus holding, disclaim Duke's title, and oust his own possession for Duke? He could forfeit his own right of possession and title, by openly and notoriously disclaiming the title under which he entered, and thereby become a trespasser as to Duke, who had the right to treat him as such, and eject him, without notice to quit

the premises: *Fishar v. Prosser*, Cowp. 217; Runn. Eject. 192, 193; Adams Eject. 55.

But what act of the tenant shall be evidence of a holding adverse to his landlord, and which will give effect to the act of limitations, destructive of the landlord's title, is a question of great delicacy, and yet greater importance to a country circumstanced as this is. The tenant can not, during the term, when holding by force of a written contract, or when holding from year to year, rightfully disclaim the landlord's title. He is estopped by the contract: 5 T. R. 4; 7 Wheat. 535; 3 Pet. 47; 4 Hayw. 158; *Wilson v. Smith T.*, 5 Yerg. 379.

In an ejectment by the landlord against the tenant, the controversy rests upon the privity existing between the parties. If the tenancy be proved, the plaintiff is entitled to recover, because the defendant is estopped by contract to say the plaintiff has no title: Adams Eject. 276.

Estoppels are mutual, 4 Com. Dig., A, 2, and therefore the tenant may defend himself, or eject the landlord, if need be, on the contract, without showing further title. Neither can he at his pleasure put an end to the contract, yet if the tenant disavows the title of the landlord, and claims to hold for himself, or for another, he forfeits his lease and title, and may be proceeded against as a trespasser by an action of ejectment: but this is at the election of the landlord, who may still treat him as tenant if he prefers it. If, after such forfeiture, the tenant hold out the landlord attempting to enter, this amounts to "an actual ouster," places the tenant in the condition of an adversary to his lessor, and is such a trespass against him as to create an adverse holding on part of the lessee; by force of which, the statute of limitations will commence its operation, to confirm the adverse claim set up by the tenant: Cowp. 217; 3 Pet. 47; 5 Id. 491; Adams Eject. 55, 56.

Adams informs us, some ambiguity seems formerly to have prevailed as to the meaning of the word, actual ouster, as though it signified some act accompanied by real force: *Burrows*, 2604; but it is now clear, that an actual ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to the jury. Thus, thirty-six years' sole and uninterrupted possession by one tenant in common, without any account to, demand made, or claim set up, by his companion, was held to be sufficient ground for the jury to presume an actual ouster of the co-tenant, and they did so presume: *Fishar v. Prosser*, Cowp. 217.

It was holden by the supreme court of the United States, in *Peyton v. Smith*, 5 Pet. 491, as the settled law, that a purchase by a tenant of an adverse title, claiming under, and attorning to it, or any other disclaimer of tenure, with the knowledge of the landlord, was a forfeiture of his term; that this possession became so far adverse that the act of limitations could begin to run in his favor from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit at any time before the period prescribed by the statute had expired by the mere force of the tenure, without any other evidence than proof of the tenancy: but that the tenant could in no case contest the right of his landlord to possession, or defend himself by any claim or title adverse to him, during the time the statute has to run. If the landlord suffers it to run out, without bringing suit, each party may stand upon their rights; but until then, the possession of the tenant is the possession of the landlord. The principles assumed meet our entire approbation.

The same court held, in *Willison v. Watkins*, 3 Pet. 47, that from a length of possession greatly more than to form the bar, without claim on part of the landlord, and a notorious holding for himself under a different title by the tenant, notice to the former, and an actual ouster, might be presumed by the jury.

But where length of time does not furnish evidence of ouster (as in this case it does not), actual knowledge for seven years must be distinctly proved by the defendant on the lessor of the plaintiff, that the tenant claimed for himself or for another: 14 Vin. Abr. 512; *Adams*, 56.

A demand of possession, and a refusal on the ground that the tenant held adversely, is sufficient evidence of actual ouster: *Hellings v. Bird*, 11 East, 49. But this information must be given to the landlord, or to his agent authorized to enter upon the premises, or sue for them by reason of the forfeiture; because the landlord must have neglected to sue for seven years. Before knowledge he could not be guilty of neglect. As to him, positive and undoubted knowledge is the date of the ouster, or rather the evidence from which it may be inferred. The privity of the parties being mutual, so must be its severance. It is going far enough to say, Duke was holden out so soon as he had knowledge Harper claimed adversely, and that this knowledge was equal to an actual turning out or holding out, on an attempt to enter for the forfeiture. But to hold that the refusal to pay rent to Tribble, who had no authority to enter

upon the land or sue for it in Duke's name, is evidence of an actual ouster of Duke, is not warranted by any authority. There being no evidence in the record going to show Duke had actual notice of the adverse holding seven years before he sued; and the court below having charged the jury that the statute commenced its operation from the sixteenth of February, 1822, the time Harper took his lease from Burton, which was contrary to the principles above declared to be the law, is erroneous. Therefore the judgment of the circuit court will be reversed, and the cause remanded for another trial.

Judgment reversed.

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ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE.—See, on this subject, *Rogers v. Waller*, 9 Am. Dec. 758; *Camp v. Camp*, 13 Id. 60 and note; *Carpenter v. Thompson*, 14 Id. 348; *Lunsford v. Turner*, 20 Id. 248; *Jackson v. Miller*, 21 Id. 316; *Jackson v. Rowland*, 22 Id. 557. The estoppel does not exist where the tenant has been induced by fraud to accept the lease: *Hall v. Benner*, 21 Id. 394. The tenant may also set up the expiration of his lessor's title: *Jackson v. Rowland*, 22 Id. 557. After eviction also, the tenant may take refuge under an adverse title by purchase or otherwise: *Fowler v. Cravens*, 20 Id. 153.

TENANT'S POSSESSION CAN NOT BECOME ADVERSE to the title of his landlord without some adverse holding out on his part: *Doak v. Donelson*, 24 Am. Dec. 485. A tenant can not constitute himself a disseisor against the will of his landlord: *Jackson v. Davis*, 15 Id. 451. For a consideration of the subject of disseisin by a tenant generally, see the note to the case last cited. Mere disclaimer of the landlord's title will not render the tenant's possession adverse. It is essential that the landlord should have notice of the disclaimer, and that the adverse possession should be continued for the statutory period thereafter before the tenant can resist the landlord's title: *Watson v. Smith*, 10 Yerg. 476; *Ross v. Blair*, Meigs, 546, both citing *Duke v. Harper*. If the landlord, having knowledge of the disclaimer, suffers the statutory period to elapse without entry or suit, he is barred; but until then the tenant's possession is his: *Lane v. Osment*, 9 Yerg. 90; *Lea v. Netherton*, Id. 316, also citing the principal case. In *Marr v. Gilliam*, 1 Coldw. 498, it is said, referring to *Duke v. Harper* among other cases, to be a nice question as to when possession is to be deemed adverse as between a trustee and his *cestui que trust*. In *Yarborough v. Newell*, 10 Yerg. 382, it is held, on the authority of the principal case, that to render the possession of a mortgagee adverse to the mortgagor, it is not sufficient for the mortgagee to deny the mortgagor's right of redemption to an agent of the mortgagor, who is constituted such agent merely to tender the money due on the mortgage.

NOTICE TO QUIT IS UNNECESSARY WHEN the tenant disclaims the landlord's title and refuses to pay rent, and a warrant for forcible detainer may be brought at once: *Bates v. Austin*, 12 Am. Dec. 395. Notice to quit is also unnecessary if there be no tenancy in fact, and particularly if the defendant disclaims a tenancy: *Jackson v. French*, 20 Id. 699.

## OWEN v. HYDE.

[6 YERGER, 334.]

**DOWAGER IS NOT BOUND TO NOTICE A DIVISION OF THE REVERSION** in the dower estate among the heirs.

**DOWAGER IS NOT GUILTY OF WASTE IN CUTTING TIMBER** on one of the lots included in the dower estate, not necessary for her support, but for purposes of profit, if the whole dower estate does not receive lasting injury thereby, but sufficient timber remains for the permanent use of the estate, although part of the timber is used for fencing on another lot of the dower estate assigned to a different heir.

**CLEARING OF TIMBER LAND FOR PURPOSES OF CULTIVATION**, on part of the dower estate, where the land already cleared is old and worn out, and enough timber is left for permanent use, is not waste in this country, though it might be otherwise in England.

ACTION for waste brought by one of the heirs of Henry Hyde, deceased, against his widow, for cutting timber on a part of the estate assigned to the latter for her dower, the reversion in that part of the dower estate having been set off to the plaintiff, on a division of the land between the heirs subsequent to the assignment of dower. The timber was cut for the purpose of clearing the land for cultivation, though not actually necessary for the defendant's support, the dower estate including already about one hundred acres of cleared land, most of which, however, was much worn. Some of the timber cut was used in fencing on another part of the dower estate assigned to another of the heirs. The court charged the jury, among other things, that the defendant could cut timber for the purpose of clearing land for cultivation, though not necessary for her support, provided enough timber was left for the permanent use of the dower estate. Verdict and judgment for the defendant, and the plaintiff brought error.

*T. H. Fletcher*, for the plaintiff in error.

*J. S. Yerger and Thompson*, for the defendant in error.

By Court, GREEN, J. The question here is, whether the judge erred in his charge to the jury. In order to the formation of a correct opinion in this cause, it is proper to remark, that whatever may be said in relation to the defendant's rights and liabilities must be understood as relating to the whole dower estate. She was not bound to notice any division which may have been made of the reversionary interest among the heirs; she took the dower estate as it was assigned to her with the rights and liabilities which attach to that as a whole; and al-

though she may have destroyed all the timber which was on that part of one of the lots included in her dower, yet, if the dower estate was not injured, but benefited thereby, she would not be guilty of waste, for that is the great criterion by which to determine whether waste has been committed, as that only which does a lasting damage to the inheritance, or depreciates its value, is waste. It is clear, that the cutting timber and clearing land instead of being waste would often greatly enhance the value of the inheritance. In this country, where so large a proportion of the lands are wild, and yet in forest, it is often of great advantage to the estate to destroy the timber and reduce the land to a state of cultivation: 3 Dane Abr. 214, 215; 4 Kent, 76, 77.

It is not a question then, whether the dowager cut the timber from this fifteen acres as a necessary means of support, but it is, did she materially injure the dower estate thereby; if so, she would be liable to an action for waste, but if not, although the clearing was not necessary for her support, and although she may have done it for the purpose of profit, she is not liable. If the cleared land on the dower estate was old and worn, and if the proportion of woodland was such as that a prudent farmer would have considered it best to reduce a portion of it to cultivation, whereby to relieve the old land from excess of culture, and thus enhance the value of the whole dower estate, such clearing would not be waste, provided, "sufficient timber for the permanent use of the dower estate" were left: 7 Johns. 227; 4 Kent, 76.

In respect to the privilege of a tenant for life, in the destruction of timber, the law must necessarily be varied in this country from the English doctrine. There, we could not well conceive of the destruction of timber without attaching to it the idea of an injury to the estate, as timber is scarce, and forest trees are planted and raised for fuel and for timber, it is of too much value to permit its unnecessary destruction. That not being the state of things here, but on the contrary, as a benefit often results to the estate by clearing away the timber, it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs.

We are therefore of opinion there was no error in the charge of the court, and order the judgment to be affirmed.

Judgment affirmed.

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WASTE IS WHATEVER TENDS TO THE DESTRUCTION of an estate, or the depreciation in value of the inheritance: *Wilde v. Layton*, 12 Am. Dec. 91. The

condition of the country is to be considered in determining what is waste: *Ward v. Sheppard*, 2 Id. 625; *Findlay v. Smith*, 8 Id. 733. Cutting timber for the purpose of clearing the land, is not waste in this country: *Ward v. Sheppard*, 2 Id. 625; *Jackson v. Brownson*, 5 Id. 258. But it would be waste to cut down all the timber, so as permanently to injure the inheritance: *Jackson v. Brownson*, *supra*.

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## STATE v. SOLOMONS.

[6 YERGER, 360.]

STATE HAS NO RIGHT OF APPEAL AFTER A VERDICT OF ACOQUITTAL ON a criminal charge.

INDICTMENT for assault and battery    The opinion states the case.

*W. K. Turner and A. Hays*, for the state.

*Clayton*, for the defendant in error.

PECK, J. The defendant had been indicted in the county court, and on trial he was acquitted by the verdict of a jury. The solicitor took an appeal to the circuit court, where a new trial was had, and verdict of guilty. On motion, the judge arrested the judgment, and the state brings the cause, by writ of error, into this court.

In the case of *The State v. Hitchcock*, this point was raised before the court in 1829, and upon the record this memorandum is indorsed by Peck, J.

“The court are unanimously of opinion that no appeal lies for the state from a verdict and judgment of acquittal, on a state prosecution. The state having established her jurisdiction and tried her experiment, should be content. To permit appeals might be the means of unnecessary vexation. The practice has been as now determined, first, in our former superior court, and second, in the circuit courts, to dismiss such appeals, coming from the county court. We will follow these determinations.” The case here cited had by appeal been taken from the county into the circuit court, and there dismissed.

It is now asked, on what are these restrictions of the courts founded? The constitution provides, that every person charged with an offense indictable shall have a speedy public trial by a jury, and that in certain cases of a serious character he shall not be put twice in jeopardy: Bill of Rights, secs. 9, 10.

The legislature have fixed the tribunal having cognizance of the offense and there is no act giving the state an appeal in

direct terms; it would be dangerous to allow so great a latitude of construction as to give it by implication. If the party has had a public trial by a jury, the constitution has been complied with, and after his acquittal should become a shield for him as to that offense.

But again it is asked, if no appeal is given to the state, what authority is there for allowing it to the prisoner? The first reply I would make to this inquiry is, that he could have it by certiorari, which before the framing of our constitution, applied in such cases, and the constitution only extended the remedy to civil cases: Art. 5, secs. 6, 7. By the certiorari he could get a new trial where justice had not been done, for the courts were open; and for an injury done him in lands, goods, person, or reputation, he was entitled to redress without delay, and by due course of law: Bill of Rights, 17. If jeopardized in his person or rights, in any respect, by a judgment of a court contrary to law, he was not without his remedy.

But the language of our acts of assembly allowing appeals, is taken as being broad enough to cover the case, where, upon a conviction on a prosecution, the defendant desires another trial.

The language of our act is, if the party be dissatisfied by the judgment, sentence, or decree of any county court, etc.: Act of 1794, c. 1, sec. 63. The term "sentence" in this section may well be taken as sufficient to allow the defendant, in a prosecution, his appeal. There are other acts to the same effect. The term "sentence" can not apply to the state where she has failed in her prosecution; so that the act can not be taken by its letter as giving an appeal to the state, if the constitution opposed no barrier, which it is believed it does.

There is no reason or justice in restricting the language of our acts to civil cases, because it is of more consequence to guard the person and character of a citizen, than to guard his property. If for the smallest sum in damages he be allowed his appeal from the judgment against him for it, how much more reasonable it is to allow the appeal where, by a sentence, his person is likely to be injured.

A fair interpretation of our acts in favor of the liberty and right the constitution guarantees, may well be taken for a defendant; while, as the terms used do not apply to the state, she shall not be permitted to experiment in the tribunal she has created, and then harass a defendant before another by appeal. With the constitution alone before us, it is questionable if ex-



press words in an act of assembly, giving an appeal to the state, would authorize it.

There is still another ground more conclusive to show that an acquittal by the jury, must be conclusive and irreversible.

The plea of the prisoner is "not guilty, and for his trial puts himself upon the country."

The oath of the jury is, "well and truly to try, and true deliverance make, between the people of the state and the accused whom they shall have in charge." This is the proper form, as well in the higher offenses as in misdemeanors: 1 Chit. Crim. L. 551. Thus the accused submits his whole fate to his jury or country. When acquittal follows by the verdict, in the language of the law, there is a deliverance by the jury that the judge has no right to gainsay. The judge on such a finding can not grant a new trial.

In England, a new trial can not in general be granted at the motion of the prosecutor; the only case put in the books where it may be allowed, is where fraud has been practiced by keeping out of the way the witnesses for the crown: 1 Chit. Crim. L. 660, or proceeding to trial without notice. Neither of these would be ground for a new trial in a criminal case in this country.

The vigilance of the state guards against these accidents; and no case can be cited where such a ground has been laid for setting aside a verdict of acquittal.

Indeed, the novelty of setting aside a verdict of acquittal in this country and arraigning before a second jury, would give instant alarm; it must be seen that, if allowed, men would be harassed in the same prosecution by experiments to reach them, and it would beget a feeling of distrust and indignation towards the administration of the criminal law which would not be patiently borne.

GREEN, J. It was determined by this court, in the case of *The State v. Hinchcock*, that when a defendant is acquitted by a jury, the state has not a right to appeal. Following that case I concur in dismissing this appeal.

CATRON, C. J., and WHYTE, J., concurred.

Appeal dismissed.

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WHETHER VERDICT OF ACQUITTAL CAN BE SET ASIDE.—That a verdict of acquittal in a criminal case should be final, and that the accused should not thereafter be exposed to the hazard of a second trial, is a principle of vital importance in the administration of any just system of criminal law. Without it, the right of trial by jury would lose most of its value as a safeguard

of personal liberty. It is not surprising, therefore, that from the earliest times it has been a maxim of the common law that *nemo debet bis vexari, si constat curia quod sit pro una et eadem causa*: 5 Co. 61. This principle has been incorporated into the constitution of the United States, as well as into the constitutions of most of the states, in the provision that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." Art. 5 of amendments to the constitution of the United States. But without the aid of this constitutional prohibition, it is perfectly well settled that, unless there be a statute to the contrary, the state can not, after a verdict of acquittal, subject an accused person to a second trial for the same offense, either by a motion in the same court, or by appeal or writ of error, except possibly where the acquittal has been procured by fraud or trick, of which we shall speak presently. "There hath yet been no instance," says Blackstone, "of granting a new trial where the prisoner was acquitted upon the first:" 4 Bl. Com. 361. It matters not whether the acquittal be due to erroneous instructions or to disobedience of instructions, or to disregard of the evidence; it is nevertheless final. The principle is thus clearly and emphatically expressed by Mr. Bishop: "If, through a misdirection of the judge on a question of law, or a mistake of the jury, or their refusal to obey the instructions of the court, or any other like cause, a verdict of acquittal is improperly rendered, the verdict can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted:" 1 Bish. Crim. L., sec. 992. The authorities sustaining this proposition are numerous, some of them being based upon the general doctrine of the common law, and others upon express constitutional provisions: 2 Graham and Wat. on New Trials, 52; 1 Bish. Crim. Proc., sec. 1272; Whart. Crim. Pr. & Pl., sec. 785; 1 Chit. Crim. L. 657; *State v. Hand*, 6 Ark. 259; *People v. Webb*, 38 Cal. 467; *People v. Bangeneaur*, 40 Id. 613; *State v. Jones*, 7 Ga. 422; *State v. Lavinia*, 25 Id. 311; *Black v. State*, 36 Id. 447; *State v. Davis*, 4 Blackf. 345; *State v. Johnson*, 8 Id. 533; *State v. Johnson*, 2 Iowa, 549; *Commonwealth v. Jefferson*, 6 B. Mon. 313; *Commonwealth v. Thompson*, 13 Id. 159; *State v. Upton*, 5 La. Ann. 438; *Commonwealth v. Cummings*, 3 Cush. 212; *State v. Anderson*, 3 Smed. & M. (Miss.) 751; *State v. Heatherly*, 4 Mo. 478; *State v. Kanouse*, 20 N. J. L. (1 Spencer), 115; *People v. Comstock*, 8 Wend. 549; *State v. Jones*, 1 Murph. 257; *State v. Taylor*, 1 Hawks, 462; *State v. Martin*, 3 Id. 381; *State v. Phillips*, 66 N. C. 646; *State v. Freeman*, Id. 647; *State v. West*, 71 Id. 263; *State v. Lee*, 10 R. I. 494; *State v. Reily*, 2 Brev. 444; *State v. Wright*, 2 Treadw. Const. 517; *State v. Norvell*, 2 Yerg. 24; *State v. Burris*, 3 Tex. 118; *State v. Kemp*, 17 Wis. 669; *United States v. Gibert*, 2 Sumn. 19; *Rex v. Lea*, 2 Moo. C. C. 9.

Said Mr. Justice Sprague, in *People v. Webb*, 38 Cal. 467: "After a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court, at the instance of the prosecution, after the defendant had been once put upon his trial for an alleged felony, upon a valid indictment, before a competent court and jury, and acquitted by the verdict of such jury; but we find a vast number of adjudications of the highest judicial tribunals of the different states, and many of the federal courts, to the effect, that no such retrial is authorized by the common law, and is directly interdicted by the constitution of the United States, and also of most of the several states."

And in case of a conviction of the defendant, he only can appeal or otherwise obtain a new trial. The state can not have a new trial awarded: *People v. Bangeneaur*, 40 Cal. 613; or take a cross appeal: *Terrell v. Commonwealth*,

13 Bush, 246. It is the former jeopardy and not the character of the verdict, that protects the defendant.

CASES OF MISDEMEANOR ARE WITHIN THE RULE.—Most of the cases above referred to arose upon indictments for felony, but the same principle undoubtedly applies to prosecutions for misdemeanors: 1 Chit. Crim. L. 657; *State v. Denton*, 6 Ark. 259; *People v. Dill*, 1 Scam. 257; *People v. Comstock*, 8 Wend. 549; *State v. Credle*, 63 N. C. 506; *State v. West*, 71 Id. 263. Thus the rule has been applied to cases of perjury, which was only a misdemeanor at common law: *The King v. Read*, 1 Lev. 9; *State v. Reynolds*, 4 Hayw. 110. So to indictments for riot: *The King v. Davis*, 12 Mod. 9; S. C., 1 Show. 336; libel: *Rez v. Bear*, 2 Salk. 646; non-repair of highways: *Rez v. Parish of Silverton*, 1 Wils. 298; *The King v. Sutton*, 5 Barn. & Adol. 52; S. C., 2 Nev. & M. 57; *The King v. Wundsworth*, 1 Barn. & Ald. 63; S. C., 2 Chit. 282; *Regina v. Challicombe*, 6 Jur. 481; *The King v. Burbon*, 5 Mau. & Sel. 392; non-repair of a church-yard fence: *The King v. Reynell*, 6 East, 315; S. C., 2 Smith, 406; encroachment on a highway: *State v. De Hart*, 7 N. J. L. (2 Halst.) 172; nuisance: *The King v. Mann*, 4 Mau. & Sel. 337; *The Queen v. Russell*, 23 L. J., N. S.; Mag. Causes, 173; S. C., 3 El. & Bl. 942; 18 Jur. 1022; 26 Eng. L. & Eq. 230; *State v. Wright*, 3 Brev. 421. In *The King v. Mann*, 4 Mau. & Sel. 337, Lord Ellenborough, C. J., said: "Unless you can point out some distinction between the case of a nuisance and other criminal cases, the general rule is, that we do not grant a new trial upon an indictment for a misdemeanor, where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right; yet it is in form a criminal proceeding, and may subject the defendant to be punished criminally."

The same principle was applied in *Commonwealth v. Sanford*, 5 Litt. 289, to a charge of bastardy, and a right of appeal by the prosecution after an acquittal denied. So, in a proceeding by information, under the statute for the condemnation of intoxicating liquors, where a new trial was refused after a verdict for the defendant, on the ground that it was in the nature of a criminal prosecution: *State v. Certain Intoxicating Liquors*, 40 Iowa, 95. So, in an action against an attorney for mal-prosecution, where, after a verdict for the defendant, the plaintiff moved for a new trial, the court said, the "defendant was sufficiently tried once when the suit was criminal." *Anonymous*, Loft, 451. So, where the case was a feigned issue to try the validity of a certain note, and a new trial was moved for after an acquittal, the court held it to be within the "same reason" as a criminal prosecution, because if the verdict had been against the defendants there must have been either an attachment or an information: *Rez v. Praed*, 4 Burr. 2257. It is said, however, that where, though the action is in form a prosecution for a misdemeanor, it is in fact merely a proceeding to try a civil right, the rule does not apply, and a new trial may be granted after an acquittal: *Queen v. Russell*, 23 L. J., N. S.; Mag. Causes, 173; S. C., 3 El. & Bl. 942; 18 Jur. 1022; 26 Eng. L. & Eq. 230, *per* Campbell, C. J.; 1 Russ. on Crimes (9th ed.), 523; the opinion of Lord Ellenborough, C. J., in *The King v. Burbon*, 5 Mau. & Sel. 392, seems, on the contrary, to have been against the propriety of breaking into the general rule in such cases.

That the common law rule, forbidding the granting of a new trial after an acquittal in a criminal case applies to prosecutions for misdemeanor as well as for felony, is clear both upon principle and authority. But where the question is rested solely on the constitutional prohibition against subjecting any person "for the same offense to be twice put in jeopardy of life or limb," it

is obvious that the rule would not apply, if the punishment for an offense did not extend to jeopardy of life or limb. In some cases, however, it has been held that every misdemeanor which is or may be punished by imprisonment comes within this constitutional provision: *Commonwealth v. Jefferson*, 6 B. Mon. 313; *State v. Spear*, 6 Mo. 644. In the latter case the defendant was indicted for selling liquor to an Indian, and after a verdict of acquittal and judgment thereon the state appealed. The court held that although the state had a right of appeal, the judgment could not be reversed or a new trial awarded, because of the prohibition in the constitution of Missouri. Napton, J., who delivered the opinion, said: "Whether an appeal to this court lies in a criminal case, as well for the state as for the defendant, I do not deem very material to determine in this case. The statute gives an appeal in criminal cases generally, without any exclusion of the state from its benefit, and I see no reason why the state should not have an appeal as well as a writ of error, which it is admitted will lie. But whether the case was brought here by appeal or by writ of error, I hold that the verdict of acquittal is a complete protection to the defendant against any further proceedings. The constitution declares, art. 13, sec. 10, that no person, after having been once acquitted by a jury, can, for the same offense, be again put in jeopardy of life or limb. By this provision I understand, that in all criminal prosecutions where a conviction would subject him to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is a complete bar to any subsequent trial. The offense charged in this indictment was punished by fine and imprisonment."

The constitutional prohibition is thus seen to be narrower than the common law rule, for the latter extends to all cases which are in fact as well as in form criminal, whatever the punishment affixed to particular offenses may be. There is certainly no reason why the right of the prosecution to an appeal, writ of error, or new trial, should depend upon the nature of the penalty in the particular case. The difference between the rule of the common law and that deduced from the constitutional prohibition becomes important only when an attempt is made by statute to give the prosecution a right to an appeal or new trial after an acquittal. In the absence of any statute the common law rule applies. Where there is a statute it may modify the common law rule so far as it is broader than the constitutional prohibition, but it can go no further.

**NO ERROR SUFFICIENT TO SET ASIDE ACQUITTAL.**—As has already been stated, there is no ground whatever, except possibly that of fraud, upon which the prosecution can successfully ask, either in the same court or in an appellate tribunal, for a new trial after a verdict of acquittal. Such a verdict is absolutely final, and the state can pursue the defendant no further: *State v. Burris*, 3 Tex. 118. The fact that the verdict is against evidence will not be ground for a new trial: *Rex v. Praed*, 4 Burr. 2257; *The King v. Reynell*, 6 East, 315; S. C., 2 Smith, 406; *The King v. Davis*, 12 Mod. 9; S. C., 1 Show. 336; *The King v. Mann*, 4 Mau. & Sel. 337. So where, on a plea of *autrefois convict*, the verdict was wholly without evidence to support it, and was contrary to the judge's opinion, it was determined that it could not be set aside and a new trial granted: *Rex v. Lee*, 2 Moo. C. C. 9. Misdirection of the jury in a matter of law, also, is no ground for setting aside a verdict of acquittal. It is true that the contrary has been intimated in several cases. Thus in the *The King v. Brice*, 1 Chit. 352, Abbott, C. J., says generally that a new trial can not be awarded after an acquittal, "unless on the ground of a misdirection of the judge," seeming to indicate some doubt at least in his

mind upon the latter point. A similar intimation is thrown out by Judge Marcy, in *People v. Mather*, 21 Am. Dec. 153. Referring to the question as to the right of the court to grant a new trial after a verdict of acquittal, he says: "That such right does not exist, where the ground of the application is that the finding is against evidence, is conceded; but whether a new trial can be granted where the acquittal has resulted from the error of the judge in stating the law to the jury, seems to be involved in much doubt. It is a very important question and not necessary to be now settled; the court have therefore deemed it discreet to forbear expressing an opinion on it till a case shall arise requiring them to do so." A new trial was in fact granted on the application of the state after a verdict of acquittal, in *State v. Goff*, 20 Ark. 289, on the ground that the jury might have been misled by certain instructions which were unwarranted by any evidence in the case. That was a prosecution for performing secular labor on the Sabbath. When that case was decided there was a statute in force giving the state a right to appeal and have the judgment reversed after an acquittal for a misdemeanor, where the punishment was only by fine: *Jones v. State*, 15 Ark. 261. It is well settled, however, as we have already said, that in the absence of any statute a new trial can not be granted after an acquittal on the ground of misdirection: *Rez v. Parish of Silvertown*, 1 Wils. 298; *State v. Credle*, 63 N. C. 506; *State v. West*, 71 Id. 263, or of the improper exclusion of evidence: *Rez v. Parish of Silvertown*, 1 Wils. 298; *State v. Reynolds*, 4 Hayw. 110; *State v. Phillips*, 66 N. C. 646. So where competent evidence was erroneously rejected, and the jury were directed to return a verdict of not guilty, the right of the state to appeal was denied: *People v. Webb*, 38 Cal. 467. So where the court erroneously refuses leave to the prosecution to enter a *nol. pros.*: *State v. Davis*, 4 Blackf. 345; *State v. Johnson*, 8 Id. 533; *State v. Heatherly*, 4 Mo. 478. An acquittal caused by the erroneous decision of the judge that the indictment was too defective to admit testimony to convict the prisoner, was held in *Bluck v. State*, 36 Ga. 447, to be final and pleadable in bar of a subsequent prosecution for the same offense. The ruling would have been the same, no doubt, if a new trial had been applied for. The fact that one of the jurors was improperly sworn, is not a sufficient ground for setting aside a verdict of acquittal: *State v. Freeman*, 66 N. C. 647. Nor can a new trial be granted after an acquittal, on the ground of misconduct of the jury: *State v. Kanouse*, 20 N. J. L. (1 Spencer), 115. In the latter case, the court say: "There never has been an instance" in which a new trial has been granted on the application of the state after an acquittal. So, where an acquittal was occasioned by a slip in the indictment, producing a variance, a new trial was refused: *King v. Merchant*, 2 Keb. 409.

WHERE A VERDICT OF ACQUITTAL HAS BEEN PROCURED BY FRAUD OR trickery, there are numerous *dicta*, and more or less positive intimations, in the authorities, to the effect that such verdict may be set aside on motion or writ of error by the prosecution and a new trial granted: *Bac. Abr.*, Trial, L. 9; *Whart. Crim. Pr. & Pl.* (8 ed.), sec. 786; 1 *Chit. Crim. L.* 657; *The King v. Davis*, 12 Mod. 9; *Rez v. Bear*, 2 Salk. 646; *State v. Upton*, 5 La. Ann. 438; *Hannaball v. Spaulding*, 1 Root, 86; *Hylliard v. Nickols*, 2 Id. 176; *State v. Brown*, 16 Conn. 54. Says Chitty: "It seems to be the better opinion, that where the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back the prosecutor's witnesses, or neglecting to give due notice of trial, a new trial may be granted:" 1 *Chit. Crim. L.* 657. In *The King v. Davis*, 12 Mod. 9, the court said, on this point: "A new trial was granted in the case of *The Queen*

v. *Coke*, the acquittal being by surprise upon the prosecutor for want of notice, it being brought on by the defendant; it was in Michaelmas term, in the third year of Queen Anne, on an indictment for keeping a common bawdy house." In *Rex v. Furser*, Say. 90, the point was directly decided. In that case the defendant's clerk in court entered notice of trial in the office book, but gave no other notice, and as a consequence the defendant was acquitted. A new trial was granted on this ground, the court holding that notice of the trial should have been given to the prosecutor or his clerk in court. On the other hand, in a very early case, it was determined, after several arguments, that a new trial should not be awarded in a case of prosecution for perjury, where an acquittal had been procured by causing the principal witnesses against the accused to be arrested for debt and kept away from the trial. The alleged perjury was committed in an action between one Primate and Sir John Jackson, on behalf of the latter. Sir John Jackson, to protect his witnesses after they had been indicted for their perjury in his behalf, caused the prosecuting witnesses to be arrested "for great sums," and thereby prevented their attendance and procured an acquittal. The facts having been proved to the satisfaction of the judges, a new trial was moved for: Windham and Twisden, JJ., favored a new trial, "in regard of the inconvenience that would ensue if such perjuries should escape with such foul practices." Hyde, C. J., was in doubt, and Keeling, J., was against a new trial as being without precedent. The hearing was adjourned to a subsequent day, when Hyde C. J., and Twisden and Keeling, JJ., pronounced against a new trial, Windham, J., being still in favor of granting it. For a full history of the cause, see *The King v. Fenwicke*, 1 Keb. 546; *Primate v. Jackson*, Id. 568; S. C., Id. 590; *Le Roy v. Fenwicke*, 1 Sid. 153; *Rex v. Jackson*, 1 Lev. 124.

Mr. Bishop very justly observes, that the question as to whether or not a new trial can be obtained by the prosecution after an acquittal in a criminal case procured by fraud, is "not beyond controversy," and expresses the opinion, that upon principle the question would turn, in each particular case, on the point, whether or not the fraud had been of such a nature that the accused was never in legal jeopardy. Speaking on this point, he says: "On principle, it would seem that if the defendant's fraud was of such nature or extent as necessarily to prevent a conviction, whatever the evidence at the prosecutor's command, there was no jeopardy, and so the new trial should be granted to the prosecutor, while, on the other hand, if it did not go so far, there was jeopardy. And, since the proceeding which worked the jeopardy was the act of the law, not of the defendant, the rule forbidding a man to rely on his own wrong would not estop him to set up this jeopardy. In other words, looking at this question as one of principle, if the fraud prevented any jeopardy, then the rule forbidding a second jeopardy would not prevent the court from granting to the state a new trial, the same as new trials are granted to plaintiffs in civil causes. But if, notwithstanding the fraud, there was legal danger of a valid conviction, then, as the defendant, on being convicted, could not rely on his own fraud as ground for a new trial, the jeopardy of the law attached, notwithstanding the fraud, and he should be protected from a second jeopardy." 1 Bish. Crim. L., sec. 1009.

This distinction seems to us too refined and indefinite to be capable of practical and uniform application in the actual trial of criminal causes. Besides, if the question is to turn, in such cases, not on the means by which the acquittal was procured, but on the point as to whether or not the trial put the defendant in jeopardy, why should the rule be restricted to cases of acquit-

tals through fraud or trickery? Take, for instance, the case of a failure to convict through the total insufficiency of the evidence, caused by the accidental and unforeseen absence of witnesses for the prosecution, or by the non-discovery of material testimony until after the trial. In such a case it might easily happen that, without any negligence on the part of the prosecution, or any fraud or trickery on the part of the defendant, there would be such an utter absence of criminating evidence that a valid conviction would be legally impossible, and yet upon a second trial the state might be able to produce ample testimony to secure a conviction. If the distinction drawn by Mr. Bishop is a sound one, why should it not be applied to a case of this kind, where there has never been any real jeopardy, as well as to a case where the absence of criminating evidence is produced by the fraud of the defendant? Indeed, upon Mr. Bishop's reasoning, it is difficult to see how there could be a case of an acquittal procured by fraud, without putting the defendant in jeopardy. A submission of a criminal cause to a jury implies the possibility of a verdict of guilty. If they should so find, notwithstanding the defendant's fraud, and he could not allege the results of that fraud as a ground for setting the verdict aside, how could he in any case escape being in jeopardy? We submit, that if a new trial should be granted in any case after an acquittal procured by fraud, the same rule should apply in all cases of acquittals obtained by such means; not because the fraud prevented jeopardy, but because it prevented justice, and the defendant should not be permitted to take advantage of his own wrong. We incline to the opinion, however, notwithstanding the *dicta* to the contrary, that an acquittal procured by fraud should furnish no exception to the general rule, that there can be no new trial after a verdict of acquittal, unless the defendant waives his objection. It is better to punish the fraud by proceeding against the perpetrator of it for contempt, as was done in *Sir John Jackson's case*, or by some other direct means suited to the case, than to abate one jot of the constitutional and common law safeguards of personal liberty. Aside, however, from the desirability of a uniform rule on this subject, it is easy to see, that to allow new trials after acquittals in criminal cases, on the ground of fraud, would sometimes involve very protracted litigation. It would never do to permit an allegation of fraud, so momentous in its possible consequences, to be tried upon affidavits without the intervention of a jury. A jury trial, with its *addenda* of a motion for a new trial, writ of error, or appeal, etc., would seem, therefore, to be the only proper mode of determining this collateral issue. The fact that, with the exception of one or two ancient and ill-reported cases, there are no direct decisions in favor of setting aside acquittals procured by fraud, is a strong argument against any such modification or limitation of the general rule, that a defendant once acquitted should "go hence without day," and be safe from further pursuit.

It is undoubtedly the settled rule that where a party by fraud or collusion procures himself to be indicted or informed against, and prosecuted for a criminal offense in a particular court, for the purpose of forestalling a prosecution in another court, he can not avail himself of a conviction or acquittal in that action as a bar to a subsequent prosecution for the same offense: Whart. Crim. Pr. & Pl. (8 ed.), sec. 451; 1 Bish. Crim. L., sec. 1010; *State v. Little*, 1 N. H. 257; *State v. Green*, 16 Iowa, 239; *State v. Reed*, 26 Conn. 209; *Commonwealth v. Dascom*, 111 Mass. 204; *State v. Cole*, 48 Mo. 70; *State v. Lowry*, 1 Swan, 34; *State v. Colvin*, 11 Humph. 599; *contra*, *State v. Casey*, Busb. (N. C.) 209. These cases were mostly prosecutions for assault and battery, where the assailant got himself convicted and fined by a particular magistrate, without the consent of the party assaulted, in order to obtain

a lighter punishment. It seems to us that such cases do not stand upon the same footing as those in which the prosecution is *bona fide*, but the defendant procures his acquittal by fraud, and the state afterwards attempts to set aside the acquittal on the ground of such fraud; although the two classes of cases are apparently confounded by some writers. It is obviously in accord with sound legal principles, that where a prosecution is instigated by the defendant, for the purpose of fraudulently defeating the ends of justice, and the party thus voluntarily places himself in apparent legal jeopardy, he should not be permitted afterwards to set up such former jeopardy in bar of another prosecution. In such a case it is apparent that it was the fraud of the defendant and not the law that produced the jeopardy. But where a new trial is sought by the prosecution after an acquittal, procured by fraud upon a *bona fide* indictment, a different case is presented. The law produced the jeopardy upon which the defendant relies, and the fraud appears only in the means used for escaping the jeopardy. Besides, in the former class of cases, there is no such difficulty in trying the issue of fraud, as that already mentioned with respect to the other class. When the former acquittal or conviction is pleaded in bar of a prosecution, and the state replies that the former prosecution was fraudulently procured, the issue of fraud is fairly presented for trial by a jury, and is not left to be settled upon affidavits.

STATUTORY PROVISIONS IN THE SEVERAL STATES.—It is proper, in this connection, to refer to some statutory enactments on this subject in several of the states. In Alabama it is provided, that in criminal cases, questions for the supreme court may be reserved by the defendant, but not by the state: Walk. Rev. Code (1867), sec. 4302. In Arkansas, the state has no right of appeal from a justice's court: Gantt Ark. Dig. (1874), sec. 2102. But the state may appeal in criminal cases, in courts of superior jurisdiction, to the supreme court, for the purpose of correcting errors prejudicial to the due and uniform administration of criminal law; but a judgment in favor of the defendant, which operates as a bar to a second prosecution, can not be reversed on such an appeal: Id., secs. 2127, 2129. The California code provides, that either party to a criminal case may appeal; but that the people can appeal only: 1. From a judgment for the defendant, on a demurrer to the indictment; 2. From an order for a new trial; 3. From an order arresting the judgment; or, 4. From any order after judgment, affecting their substantial rights: Cal. Penal Code, secs. 1235, 1238. The statutes of Dakota provide for a writ of error in favor of the territory in the first three cases mentioned in the California code: Revised Codes of Dakota (1877), 903; Code of Crim. Proc., sec. 476. In Georgia it is provided that there shall be no new trial in a criminal case after a verdict of acquittal: Hopk. Annotated Penal Laws of Georgia, sec. 1600. Either party to a criminal case may appeal in Idaho: Crim. Pr. Act, sec. 465; but an appeal by the people does not stay or effect a judgment in favor of the defendant: Sec. 473. In Indiana, in case of an acquittal in a criminal case, the prosecuting attorney may take a reserved case to the supreme court by appeal, for the purpose of determining the law for future guidance, but there can be reversal of the judgment: 2 Dav. Stat. (Rev. of 1876), p. 405, sec. 119; *State v. Bartlett*, 9 Ind. 569.

The law of Iowa is substantially the same as that of Indiana: Iowa Code, secs. 4521, 4539; *State v. Kinney*, 44 Iowa, 444. The statute in Kansas provides for an appeal by the state: 1. From an order quashing an indictment; 2. From an order arresting the judgment; and, 3. Upon a question reserved: Dassel's Comp. Laws (1879), p. 764, sec. 283; *State v. Carmichael*, 3 Kana. 102.



But a verdict of "not guilty" can not be set aside and a new trial granted: *State v. Crosby*, 17 Kans. 396. So a judgment of acquittal, where the case is submitted to the court upon an agreed statement of facts, without the intervention of a jury: *Olathe v. Adams*, 15 Id. 391. In Kentucky, the commonwealth may appeal, but where the punishment may be imprisonment, a judgment of acquittal, which operates as a bar to future prosecution, can not be reversed: Bullitt's Codes, Crim. Pr. Act, secs. 339, 352. The Maryland code provides for an appeal on behalf of the state, as well as on behalf of the defendant, from "any ruling or determination of the court" in a criminal case: Maryland Rev. Code (1878), p. 769, sec. 37, art. 71. Indeed, before that statute, it was settled in that state, that writs of error lay at the instance of the prosecution in a criminal case: *State v. Buchanan*, 9 Am. Dec. 534. That, however, was a case of a judgment for the defendant on a demurrer to the indictment; and though the rule there laid down is expressed in very general terms, it seems never to have been understood to apply to cases of acquittal by a jury. The decisions under the statute, also, are none of them cases of acquittal. The statutes of Nebraska give the prosecution a right to take exceptions upon the trial of a criminal case, and to have them heard, but a verdict in favor of the defendant can not be in any manner affected by the determination of the appellate court: Gen. Stat. (1873), 829, 835, 836; Crim. Proc., secs. 483, 515-517. In Nevada, also, either party may appeal, but such appeal by the people does not stay or affect a judgment in favor of the defendant: Comp. Laws of Nev. (1873), secs. 2004, 2103. In New York, a writ of error lies on behalf of the people in every case of a judgment for the defendant, except upon acquittal by a jury: 1 Fay Dig. of L. 342. The Oregon code gives the state a right of appeal only from a judgment on demurrer to the indictment, or from an order arresting a judgment of conviction: Code of Crim. Proc., secs. 224, 227; Gen. Laws (1872), compiled by Deady and Lane. In Tennessee there is no appeal by the state: Stat. of Tennessee (1871), by Thompson and Steger, sec. 5244. An appeal by the state lies in Texas upon a judgment in favor of the defendant on an exception to the indictment, or on a motion in arrest of judgment: Pasch. Dig., art. 3182. In Virginia and West Virginia a writ of error lies in behalf of the commonwealth in criminal cases relating to the revenue: Kelly Rev. Stat. of W. Va., c. 56, sec. 3; New Crim. Proc. of Va. (1878), c. 18, sec. 3. A prosecution for a violation of the liquor license law is held to be within this provision: *Commonwealth v. Scott*, 10 Gratt. 749; *State v. Church*, 4 W. Va. 745; *State v. Kyle*, 8 Id. 711.

**STATUTE GIVING APPEAL AFTER ACQUITTAL IS UNCONSTITUTIONAL.**—It is clear that where there is a provision in the constitution of a state that no person shall after acquittal be again tried for the same offense, a statute giving the prosecution a right of appeal after acquittal on a valid indictment or information is utterly void: 1 Bish. Crim. L., sec. 1026; *State v. Van Horton*, 26 Iowa, 402. That case arose on a statute giving either party a right of appeal in certain cases triable before a justice; and, there being a provision of the kind above stated in the constitution of Iowa, the court held that where a defendant had been acquitted in a justice's court, in a case within its jurisdiction, he could not be tried anew in the district court upon an appeal from the judgment in the justice's court.

**WHERE THERE ARE TWO COUNTS IN AN INDICTMENT, and the defendant is acquitted on one and convicted on the other, and by motion, appeal, or writ of error, obtains a new trial, the sounder opinion, and that supported by the greater weight of authority, is that he can be retried only on the count on**

which he was convicted: *State v. Malling*, 11 Iowa, 239; *State v. Dark*, 8 Blackf. 526; *State v. Kattlemann*, 35 Mo. 105; *Campbell v. State*, 9 Yerg. 333; *Emon v. State*, 1 Swan, 14; *State v. Kittle*, 2 Tyler, 471; *Stuart v. Commonwealth*, 28 Gratt. 950. But there are some decisions to the contrary: *State v. Stanton*, 1 Ired. L. 424; *Lesslie v. State*, 18 Ohio St. 390; *State v. Commissioners*, 3 Hill (S. C.), 239. So where a party is indicted for a crime of which there are several degrees, and is acquitted of a higher degree but convicted of a lower, and obtains a new trial, he can be retried only for the degree of which he was convicted. Thus, where a defendant is indicted for murder, but acquitted of that offense and convicted of manslaughter, and succeeds in setting aside the verdict and getting a new trial, he can only be tried for manslaughter on the second trial: *People v. Gilmore*, 4 Cal. 376; *State v. Ross*, 29 Mo. 32; *Slaughter v. State*, 6 Humph. 410.

**PENAL ACTIONS.**—*Qui tam* actions for penalties and penal actions generally, being somewhat of the nature of criminal prosecutions, the courts have been reluctant to grant new trials after verdicts of acquittal in such actions: *Steel qui tam v. Roach*, 1 Bay, 63. The rule applicable to this class of actions seems to be, that after an acquittal a new trial will not be granted on the ground that the verdict was against evidence: *Mattison v. Allanson*, 2 Str. 1238; *Fonereau v. ———*, 3 Wils. 59; *Wilson v. Rastall*, 4 T. R. 753; *Lawyer v. Smith*, 1 Denio, 207; *Hannaball v. Spaulding*, 1 Root, 86; *United States v. Halberstadt*, Gilp. 262; but that it may be where the court has misdirected the jury in a matter of law, or the verdict has been procured by the fraud or malpractice of the defendant: *Martin qui tam v. McNight*, 1 Overt. 330; *Hannaball v. Spaulding*, 1 Root, 86; *United States v. Halberstadt*, Gilp. 262; as where the acquittal was procured by fraudulently concealing the fact that a certain person was interested in the event of the action, and producing such person as a witness: *Pruden v. Northrup*, 1 Root, 93, or by producing a forged deposition: *Hylliard v. Nickols*, 2 Id. 176. In a case of a verdict of "not guilty" on an information in the nature of *quo warranto*, there has been some doubt as to whether or not a new trial could be had: *Rez v. Blunt*, Say. 102; *Rez v. Bennett*, 1 Str. 101; *The King v. Jones*, 8 Mod. 201. But the better doctrine, and that adopted by the later cases, is that such actions are merely civil, and that the prosecution has the same rights as to new trial, appeal, etc., as plaintiffs in ordinary actions: *The King v. Francis*, 2 T. R. 484. See on this point 1 Bish. Crim. L., sec. 993.

## EWELL v. STATE.

[6 YERGER, 364.]

**REPUTATION IS SUFFICIENT EVIDENCE OF RELATIONSHIP** between the parties on an indictment for incest.

**ADMISSION OF INCOMPETENT EVIDENCE WITHOUT OBJECTION** is no ground for reversing a judgment in a criminal case. *Per Catron, C. J. Peck, J., contra.*

**WHERE THE VENUE IS NOT PROVED IN A CRIMINAL CASE** as appears from the bill of exceptions setting out the whole evidence, the judgment against the prisoner must be reversed.

**INDICTMENT** against the defendant, Dabney Ewell, for incest committed with one Sarah Ewell, the daughter of Pleasant

Ewell, the defendant's brother. The bill of exceptions purported to set out the whole evidence. It appeared that the only evidence offered of the relationship between the defendant and Pleasant Ewell, and between Pleasant Ewell and Sarah Ewell, was general reputation. Evidence of incestuous intercourse between the defendant and the said Sarah prior to the time that the penal code went into effect, and after the finding of the indictment, was received without objection. There was no proof that the crime was committed in Bedford county, as charged. Verdict of guilty. Motion for a new trial overruled, to which the defendant excepted, and judgment on the verdict, from which the defendant took an appeal in the nature of a writ of error.

*Fletcher*, for the plaintiff in error.

*A. Hays*, attorney-general for the seventh district, for the state.

CARSON, C. J. 1. Was the evidence, that Sarah Ewell was the daughter of Pleasant Ewell, and that Dabney Ewell was the brother of Pleasant Ewell, competent?

The witnesses say they were so reputed. It is insisted that the marriage of the father and mother of Pleasant and Dabney Ewell must be proved, and also that of Pleasant Ewell and his wife, the mother of Sarah Ewell, and then the issue: that this is the best evidence of relationship: that the very fact of marriage of the parents must be proved as in cases of bigamy, and for criminal conversation.

In these cases the indictment in the one, and the declaration in the other, aver, of necessity, the existence of a marriage, for the violation of which the defendant is punished. In bigamy, if he had not been previously married, there was no crime in marrying.

But here, there is no such allegation, and no necessity for proof other than such as corresponds with the averment in this respect.

The witnesses say Pleasant Ewell and Dabney Ewell were reputed to be brothers, and Sarah Ewell was reputed to be the daughter of Pleasant Ewell. What more can any man prove of his neighbors generally? The fact of the birth of even the young woman it would be difficult to prove, the marriage of her parents still more so; and to prove the marriage of the parents of Pleasant and Dabney Ewell, and the respective births of these during that marriage, would be so nearly impossible as to

render a prosecution for incest a hopeless experiment. That the fact, recognized all their lives, never denied or doubted by any one, should be incompetent evidence to a jury to prove the Ewells brothers, and that Sarah Ewell was the daughter of Pleasant Ewell, could not be proved by a young woman who had known her from her infancy, had grown up with, and been her playmate, comes so strongly in conflict with the common mode of learning who our neighbors are, that it is impossible to give it place in the mind without violating the best impressed convictions of established truths. The plain sense of mankind would revolt at a decision declaring such proof incompetent, and in its stead requiring marriages and births to be proved, some of them having happened perhaps fifty or sixty years since, and probably in a foreign country, and that this too must be proved by persons present, and a marriage license be produced. To sustain the prosecution, two marriages and three births must be established by the best evidence the nature of the case admits of. I think this objection can not be sustained, testing it either by common sense, on principle, or by authority.

It is a primary rule on the trial of issues, that the proofs must correspond with the allegations, and that this proof must be the best in the power of the party who maintains the affirmative. If it appear that better evidence is behind, and in the party's power, the presumption is that it is unfavorable, or it would have been produced. As if *non est factum* be pleaded to a bond sued on, the subscribing witness, if one, must be introduced to prove the execution of the bond; yet if he be beyond the jurisdiction of the court, the handwriting of the witness or obligor may be given in evidence, because the best in the plaintiff's power: *Stump v. Hughes*, 4 Hay. 96.<sup>1</sup> In establishing rules of evidence, arguments from inconvenience have great weight. The situation of the country must be attended to, and the rules of evidence adapted to its circumstances. That which might be very easily proved in England, as a marriage by a parish register, it would be next to impossible to prove in a country new as this; hence the necessity, in some instances, of relaxing the rules of evidence found in the English books. That this should not be done, save in cases of the most manifest necessity, is admitted, yet such occasions will arise. In England it is a rule, that in an action for criminal conversation with the plaintiff's wife, a marriage in fact must be proved: *Morris v. Miller*, 4 Burr. 2059. Acknowledgments, co-

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1. 5 Hayw. 94.

habitation and reputation are not sufficient to maintain the action. Such a case presented itself to the supreme court of Pennsylvania: *Forney v. Hallacher*, 8 Serg. & R. 160 [11 Am. Dec. 590], where the court doubts the correctness of the decision in *Burrow*, but declares, were it correct, that circumstances peculiar to that state required the rule in some degree to be relaxed. It is said: "The boundless field of enterprise in the new states that are continually forming, renders the habits of the people of America essentially those of migration; and besides, no inconsiderable portion of the population is made up of emigrants from abroad, many of whom are married when they come here. The witnesses to marriages celebrated here, are in the usual course soon dispersed over this extensive country, and neither their testimony nor that of witnesses abroad can ordinarily be had, except at an expense that puts it beyond the reach of all whose circumstances are not above mediocrity."

These remarks apply with more force to Tennessee than they did to Pennsylvania, because this is a much newer country than that. In criminal causes, where the accused must be confronted with the witnesses, it would be impossible to prove a marriage in fact in a majority of instances, indeed, in almost every instance where the marriage had taken place abroad, either in Europe or a sister state. To adopt, and in its strictness apply the English rule in cases of criminal conversation and bigamy, in this case, and compel the state to prove a marriage in fact between the father and mother of the Ewells; and then the marriage in fact between Pleasant Ewell and his wife, and this by witnesses present at the respective marriage ceremonies, would be requiring next to an impossibility. The County of Bedford, where the crime was committed, has been settled but little more than twenty years; that witnesses could be found there to prove the most recent marriage, is improbable, but that none could be found there to prove the marriage of the grandfather and mother of the offending female, may be taken for granted. To sustain the objection to the competency of the evidence of refutation of marriage, would be to discharge the defendant.

But, uninfluenced by any considerations growing out of the situation of this country, was not the evidence correctly admitted by the circuit court? The rule that the best evidence the nature of the case admits of shall be had, and that hearsay is not equal to knowledge of the fact and generally incompetent, has its exceptions, grounded partly in necessity, and partly on

the probability that common repute is true in certain cases. The exception has become a general rule of evidence where the fact of marriage, the state and condition of the family, or the relationship of its various members is sought to be established. Cohabitation as man and wife, and general reputation, are evidence of marriage as well as relationship: 1 Stark. Ev. 58; 2 Id. 959; *Vaughan v. Phebe*, 1 Mart. & Y. 17 [17 Am. Dec. 770].

This being a general rule, does the case of incest form an exception to it? In bigamy the crime consists in violating the first marriage vow. This is precisely alleged in the indictment, and the English courts hold must be as precisely proved by evidence of the fact of marriage. In cases for criminal conversation, the violation of the marital rights of the husband is the ground of action. The marriage must be alleged and strictly proved. The strictness of the rule in cases of bigamy was recognized and provided against in the penitentiary act, sec. 16, so as to make the defendant's acknowledgments and conduct evidence. Incest being a newly-created felony by the 18th section of that act, must, on a trial of the charge, be proved as charged. The charge is that the defendant had carnal knowledge of his brother's daughter. To establish the relationship of the offending parties, that of the brothers must be made out, as also that of father and daughter. But these are incidental facts not alleged in this indictment, or required to be alleged by the statute. To prove the relationship, the general rules of evidence apply in this case, as in others where pedigree must be proved to establish a fact or make out a title. There is no difference as to rules of evidence in criminal and civil causes: 2 McNally Ev., p. 357, c. 1, rule 6; *Attorney-general v. Le Marchant*.<sup>1</sup> Such proof as the nature of the case admits of and is in the power of the party, whether state or defendant, is competent in a prosecution for felony, if it would be competent in an action of ejectment: McNally Ev. 73. According to the rules of evidence laid down in the English authorities the proof was correctly heard.

We have examined the case of the *State v. Roswell*, in 6 Conn. 447. There it was holden, a marriage in fact must be proved between the father and mother. The father was charged with the commission of the crime of incest with his legitimate daughter, and the court grounded its opinion on the word legitimate. The Connecticut statute we have not seen, therefore can not judge of the correctness of the decision.

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1. 2 T. R. 201, note.

It is next objected, that the court permitted the jury to hear proof of acts of incest by defendant before the penitentiary act took effect, and also after the indictment was found. So is the statement in the bill of exceptions. But no objection was made to the introduction of the evidence, and in a civil cause no advantage could be taken of the circumstance on a writ of error. The counsel for defendant, however, earnestly insists that as a revising tribunal, the supreme court ought to see that justice be done the defendant, regardless of the formalities observed in civil causes.

The law is well settled, that in a civil cause if evidence be offered which is incompetent, but permitted to go to the jury without objection, it is too late to except after verdict. The objection to the character of the evidence is waived: *Jackson v. Dillon*, 2 Tenn. 263.

On what ground is it asked to depart from this rule? The act of 1811, c. 72, gives the appeal in the nature of a writ of error. The terms of the act do not seem to embrace criminal causes. The supreme court construed the act to include them, and determined in favor of its jurisdiction. So is the now settled law. But from this decision a consequence followed. To make the appeal in error effectual, it was necessary to give the defendant the right to a bill of exceptions in the court below. The bill of exceptions is not authorized by the act of 1811, or any other American statute, but rests on the stat. of West. 2, 13 Edw. I., stat. 1, c. 31; 1 Stat. at large, 105; McNally Ev. 325; 1 Stark. Ev. 430.

The statute of West. 2, did not extend to criminal cases, as was determined in *Sir Henry Vane's case*, 2 State Trials, 435; McNally Ev. 325; yet in this state it was permitted defendants to except so soon as the writ of error was allowed them under the act of 1811, the same as in civil causes, most probably without strict inquiry as to the authority. However doubtful the right may have been when first assumed, it is not now open to challenge. But on what ground does the plaintiff in error stand? On the foot of a party in a civil suit. The defendant has availed himself of a statute applicable in its terms to civil causes only; and to say it meant one thing in this cause, and differently in another, would be to shape it to our fancy.

It is made our duty by the statute to revise the orders and judgments of the court below. Evidence is offered by the state, is not objected to, and heard: nor is the court asked to withdraw it from the jury when the cause is finally submitted. A

verdict is had, and then complaint is made that improper evidence was admitted. When the court or the opposite counsel is not asked to think or act, and all objections are waived, and an experiment is made, the rules of law and propriety require the party complaining should not be heard. No judgment has been given for this court to revise. Suppose one of the grand jurors who found the indictment had been presented as a traverse juror, not objected to by the prisoner, and been one of the jury who found him guilty: would this be error? Clearly not. The objection must come in time: 1 Yerg. 219. In admitting evidence there is no distinction between civil and criminal causes, the rules of practice in this respect being the same. The cause of *Jackson v. Dillon* is conclusive. It has been followed as undoubted authority, and often, by this court.

It is next objected, that it is not stated in the bill of exceptions that the crime was committed in the county of Bedford; nor can the fact be inferred from the proof set forth in the record; which we are told was the whole proof.

The court below not having had jurisdiction from anything appearing, the defendant ought to have been discharged. We have anxiously looked for proof of natural objects, of which we can judicially take notice, to supply this defect in the facts set forth by the record, but none exist from which the fact may be inferred. We feel, therefore, bound on this ground to order a new trial.

PROX, J. I will briefly notice two of the objections urged for the prisoner, Ewell.

First, the admissibility of evidence of acts of incest before the passage of the act of assembly under which Ewell stands indicted, and like acts proved to have been committed after the finding of the bill of indictment and before trial.

In my opinion this evidence was inadmissible, and should, if incautiously admitted and not objected to, have been withdrawn from the consideration of the jury by the charge of the court; for if suffered to have influence, it is impossible for this court to know on what part of the evidence offered the jury have predicated their verdict.

This question, I am free to own, would have been more clear if the evidence had been excepted to, and in that form presented to our consideration. Still, there is enough upon the record to show that it had been received; and the court, having been called upon to grant a new trial, that motion so far preserves the point as to bring it to the notice of this court. The



influence of illegal testimony offered by the state, though not objected to by the prisoner, was ground for a new trial; and that motion being overruled by the judge, and all the evidence set out, we may fairly infer that this was urged as a main ground for setting aside the verdict. The court should have seen that no improper advantage had been taken of the prisoner; he was entitled to the law of his case, the last moment as well as the first. When the judge was pointed to the error, he should have corrected it; and it being my duty to give the judgment the circuit court ought to have given, I am for giving a new trial upon that ground.

2. That no venue appears to have been proved: The whole evidence being set out, establishes the objection; it must be allowed also.

I will not relax old and inflexible rules in the administration of the criminal law; there is no reason for it. Whenever we depart from the great landmarks which have been the guides for ages, we enter on a sea of uncertainty and hazard everything.

While life and liberty are more precious than property, I am cautioned to be more vigilant in my course, and am therefore unwilling to admit any doctrine which may savor of innovation. In the other point of the case relied on, I concur in the opinion delivered by the other member of the court.

GREEN, J., concurred with the chief justice in the first and third points, but was not satisfied either way upon the second.

WHYTE, J., gave no opinion.

Judgment reversed.

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REPUTATION AS PROOF OF RELATIONSHIP OR PEDIGREE.—See *Chapman v. Chapman*, 7 Am. Dec. 277; *Birney v. Hann*, 13 Id. 167; *Jackson v. King*, 15 Id. 468; *Vaughan v. Phebe*, 17 Id. 770. It is said in *Johnson v. Johnson*, 1 Coldw. 631, referring to the principal case as authority, that it is a familiar doctrine that in all cases, except prosecutions for bigamy and criminal conversation, marriage may be presumed or established by reputation after the lapse of many years.

OBJECTION TO EVIDENCE NOT TAKEN AT THE TRIAL can not be taken advantage of on appeal: *Snyder v. Laframboise*, 12 Am. Dec. 187; *Jackson v. Davis*, 15 Id. 451; *Wait v. Maxwell*, 16 Id. 391. So where the evidence was admitted by consent: *Edelen v. Hardey's Lessee*, 16 Id. 292. Admission of incompetent evidence without objection is no ground for a new trial: *Sharp v. Wilhite*, 2 Humph. 437; *Richmond v. Richmond*, 10 Yerg. 346; *Heatherly v. Bridges*, 1 Heisk. 223, all citing the principal case. But this rule is not without exceptions. Says Sneed, J., in delivering the opinion in the case last cited: "It is true that this court has repeatedly held that the admission of illegal evidence without objection can not be assigned as error: *Cooke*,

102; *Hudson v. State*, 9 Yerg. 408; *Ewell v. State*, 6 Id. 364, 374. But this rule, like many other doctrines of the law of evidence, has its exceptions and modifications. We do not suppose that evidence simply illegal, though objected to, would justify the granting of a new trial, unless such evidence was hurtful, or likely to prove so, to the cause of the party objecting. If it were matter harmless or irrelevant, the court would not, for this merely, set aside a verdict, even if objected to. But we take it to be a sound principle, that if illegal matter objected to, however harmless or irrelevant of itself when considered in connection with other illegal testimony unobjected to, is calculated seriously to affect the interest of the party, then both should be considered by the court in estimating the probable influence of the first upon the minds of the jury."

WHERE THE BILL OF EXCEPTIONS PURPORTS TO SET OUT ALL THE EVIDENCE, and no evidence appears of a fact essential to support a conviction in a criminal case, the court will not presume that fact to have been proved, as that the person assaulted by a slave was a white man, that fact being necessary to a conviction: *Elijah v. State*, 2 Humph. 456, citing the principal case.

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## DICKINS v. JONES.

[6 YERGER, 483.]

ONE PAYING MONEY UNDER A MISTAKE OF FACT to one not entitled to receive or retain it, may recover it in assumpsit.

MONEY VOLUNTARILY PAID ON AN UNCONSTITUTIONAL ASSESSMENT of taxes can not be recovered from the sheriff, especially after he has paid it into the treasury.

ACTION for money had and received, brought against the defendant, to recover money paid to him as sheriff, by the plaintiff, for certain taxes which had since been declared to have been unconstitutionally assessed. The defendant had paid the money to the treasurer, the plaintiff not having previously demanded it or given him notice not to pay it over. The judge below ruled that the defendant was not liable. Verdict for the defendant. Motion for a new trial overruled, and judgment on the verdict, and the plaintiff appealed.

*J. D. Martin*, for the plaintiff in error.

*P. M. Miller*, for the defendant in error.

By Court, CATRON, C. J. Money paid under a mistake of the facts, to one not entitled to receive it, and who has no claim in conscience to retain it, may be recovered back in assumpsit. 2 Stark. Ev. 112.

But we are of opinion that the money paid to the sheriff for assessed taxes, although a part thereof could not be assessed under our constitution, can not be recovered, especially after the sheriff had paid over the money to the treasury. From

anything appearing, the payment by the plaintiff was voluntary, and with a knowledge of the law; certainly it was made with full knowledge of all the facts; and two of the members of this court are of opinion, that money paid under a knowledge of all the facts, can not be recovered on the ground that the plaintiff mistook the law: 2 Stark. Ev. 112. Slight circumstances have been permitted to take cases out of the rule, and justly; but no circumstances exist in this instance to warrant a departure from it; and therefore the judgment of the circuit court must be affirmed.

Judgment affirmed.

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MONEY PAID UNDER A MISTAKE, OR IN IGNORANCE of an essential fact, to one not entitled to receive it, may be recovered in an action for money had and received, but not where it is paid with a knowledge of the facts, but under a mistake of law: *Garland v. Salem Bank*, 6 Am. Dec. 86; *Waite v. Leggett*, 18 Id. 441 and note; *Mowatt v. Wright*, 19 Id. 508 and note; *Feemster v. Markham*, Id. 131. So held in *Frazier v. Tubb*, 2 Heisk. 667, citing the principal case.

MONEY VOLUNTARILY PAID UNDER NO LEGAL OBLIGATION, but without fraud or deceit, can not be recovered: *Morris v. Tarin*, 1 Am. Dec. 233; *Hall v. Shultz*, 4 Id. 270. So money voluntarily paid under an award of arbitrators: *Bulkley v. Stewart*, 2 Id. 57. So where money has been voluntarily paid with full knowledge of the facts to one having a right in conscience, but not in law, to receive the same: *Hubbard v. Martin*, 8 Yerg. 500, citing *Dickins v. Jones*. That taxes improperly paid can not be recovered by action is held *arguendo*, commenting on the principal case as an authority on this point, in *Friedman v. Matthes*, 8 Heisk. 499.

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## MAYOR ETC. OF MEMPHIS v. WRIGHT. •

[6 YERGER, 497.]

**MUNICIPAL CORPORATION MAY APPLY ITS LAND TO A DIFFERENT USE** from that for which it was designated when the town was originally laid off, where such corporation has by its charter power "to do all things necessary to be done by corporations."

**LAND SET APART FOR A PUBLIC PROMENADE**, in laying off a town by the town proprietor, may be appropriated to use as a steamboat landing by the corporate authorities, if they deem it necessary to promote the prosperity of the town.

**RIGHT OF EACH NAVIGATOR OF A PUBLIC RIVER TO THE USE OF THE BANK**, is subject to the sovereign power of eminent domain, by the exercise of which power any particular portion of the bank may be appropriated to exclusive use as a ferry or other landing, if the public good requires it.

**EMINENT DOMAIN, MUNICIPAL CORPORATION MAY EXERCISE, WHEN.**—A municipal corporation having power by its charter "to do all things necessary to be done by corporations," may appropriate a part of the bank

of a public river within its limits, to exclusive use as a steamboat landing, and prohibit the landing of other water craft there. Thus, the city of Memphis, having such a clause in its charter, has power to condemn for use as a steamboat landing, any portion of the bank of the Mississippi river within its limits.

ACTION to recover a penalty imposed by an ordinance of the mayor and aldermen of Memphis, prohibiting the landing of flat-boats and other water craft, except steamboats, at a particular place on the bank of the Mississippi river, set apart by the corporation for a steamboat landing, the defendant having made his flat-boat fast to the bank at that place for a number of hours, in violation of the ordinance. The action was originally brought in a justice's court, and after judgment for the plaintiffs, was appealed to the circuit court. It appeared that the said steamboat landing was on the part of the river bank laid out on the town plat as a public promenade. The provision of the charter under which the plaintiffs claimed power to lay off the steamboat landing is stated in the opinion. The judge instructed the jury that if it did not appear to their satisfaction that the landing was a public one, laid off as such by the town proprietor, but that it was made on ground laid off on the town plan for a public promenade, the plaintiffs could not recover. Verdict for the defendant; motion for a new trial overruled, and the plaintiffs brought the case here by an appeal in the nature of a writ of error.

*J. D. Martin*, for the plaintiffs in error.

*B. McAlpin*, for the defendant in error.

By Court, GREEN, J. The part of the charge complained of, assumes, that a corporation can not apply the public property of a town to any new use, other than that for which it was designated when the town was originally laid off. In this we are of opinion that the court erred. The public property belongs to the corporators, and may be appropriated by them to any use they may think proper. The mayor and aldermen are the representatives of these corporators, and have vested in them all the right to dispose of, or apply to any use they may think proper, the public promenade, public squares, etc., which existed in the original proprietors. If this were not so, a thriving town would be exceedingly crippled in the exercise of its corporate rights. Few persons would have sufficient foresight in laying off a town, to anticipate and provide everything, that was calculated to promote its prosperity and good government.

It must therefore be among the powers of a corporate town, having by its charter a right "to do all things necessary to be done by corporations," to lay off new streets, squares, lanes, and alleys, and to construct wharves and other conveniences for the trade and comfort of the citizens, and by ordinances to regulate the manner in which they shall be used. These powers are "necessary to be done" that the prosperity of the town may be promoted, and that its peace and order may be preserved.

In argument another point has been insisted on, which is this: Because the Mississippi river is a public highway, to the navigation of which all have a right, together with the privilege of using the banks on which to land, that therefore, the corporation of Memphis has no right to appropriate any portion of the banks for an exclusive purpose.

It is a well-settled principle, that the state in which resides the eminent domain to the whole territory, has the right to appropriate even the property of a private citizen to public use; compensating the citizen therefor. Upon this principle is land condemned for mills, roads, and ferries. The right of each navigator of the river to the use of the bank, can not be of a higher nature than the right of a citizen to the land which the state has granted to him. As therefore the latter can be deprived of his land for public use, so may the former be deprived of the use of particular portions of the bank, if the public good demand it. Hence ferries are established on the Mississippi river, and portions of the banks are designated as the landing-places. It will not be contended that a set of boatmen would have a right to crowd their flat-boats at the ferry landing so as to exclude the ferry boat. And why? Because the establishment of the ferry has appropriated to this exclusive use the banks at the places of landing.

By the act of incorporation, all the power to condemn for a particular public use, any portion of the bank of the Mississippi included in the corporation, which existed in the legislature of the state, is transferred to the corporation of Memphis, for the latter clause of the second section of the charter of incorporation says it shall have power "to do all things necessary to be done by corporations." For the encouragement of trade, the construction of convenient places of landing was "necessary to be done," and for the preservation of peace and good order, the designation of particular landings for different kinds of water craft was "necessary." But this designation would have

been useless had it not been enforced by a penalty; therefore the corporation had authority to enact the ordinance in question.

The judgment must be reversed, and the cause be remanded to the circuit court of Shelby for another trial.

Judgment reversed.

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**DIVERSION OF LAND APPROPRIATED TO PUBLIC USE to another public use:** See on this point, *Wellington et al., Petitioners*, 28 Am. Dec. 631 and note. In *Tennessee etc. R. R. Co. v. Adams*, 3 Head, 601, the principal case is incidentally noticed as an authority on this subject, in suggesting, but not deciding, the question whether or not a municipal corporation can grant the use or soil of an alley for railway purposes. The case is cited on the same point in *Adams v. Memphis etc. R. R. Co.*, 2 Coldw. 645, where it is held that a municipal corporation may mortgage land ceded to it "for the benefit of said city," to aid in constructing a railway to it. In the course of their opinion the court say: "A corporation is, in the estimation of the law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual, in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing: *Union Bank v. Jacobs*, 4 Humph. 515, 525; *Mayor etc. of Memphis v. Wright*, 6 Yerg. 497."

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## JACAWAY v. DULA.

[7 YERGER, 82.]

**PROVOCATION TO MITIGATE DAMAGES FOR AN ASSAULT** and battery is not admissible in evidence in an action for such injury, unless it immediately preceded it, so that the blood had not time to cool.

**ACCUSATION OF THEFT MADE BY THE PARTY ASSAULTED** against the assailant the day before the assault, and not shown to have been communicated to the assailant on the day of the assault, is not admissible in evidence in mitigation of damages in such action.

**ACTION** for assault and battery. The defendant offered to prove, in mitigation of damages, that the plaintiff, on the day before the assault, had charged him, the defendant, with having stolen certain money, but such accusation not being shown to have come to the defendant's knowledge on the day of the assault, the evidence in mitigation was rejected. Verdict and judgment for the plaintiff, and the defendant appealed in the nature of a writ of error.

*M. Thul*, for the plaintiff in error.

*H. L. Turney*, for the defendant in error.

By Court, GREEN, J. We think the court did right in the rejection of the evidence offered. Provocations are admissible

in evidence to mitigate damages in an action of assault and battery, but they must be given immediately previous to the assault. If the blood has time to cool after the provocation and before the battery is committed, evidence of the provocation is inadmissible for any purpose: 3 Stark. 1461; 1 Mass. 12. The circuit court, therefore, went far enough when it only restricted the defendant to proof that the provoking fact had come to his knowledge on the day he committed the battery. This is extending the rule farther than the authorities warrant. It would, as the court say in the above case of *Avery v. Ray*, 1 Mass. 12, be emphatically going too far, and contrary to all rule, to permit the evidence which was offered in this case. The court would be in favor of admitting evidence of a provocation which might come to the knowledge of a party immediately before the battery, although the facts thus provoking him may have previously existed. This would be within the reason of the rule. The blood would be as much heated by the communication to a party of the fact that an injury had been previously inflicted on his character, or his property, as though he had witnessed the injurious conduct. The law would, therefore, equally regard the frailty of his nature, and extenuate the violence of his conduct in the one case as in the other.

But if it were admitted that former provocations should be given in evidence to mitigate damages, where would the court stop? If after the blood has had time to cool, and the passions have so subsided as that deliberation is restored, a party may offer such provocation in mitigation of a battery; he may, upon the same principle, go back to any distance of time for a provocation to extenuate the injury he inflicts. Such a rule would be of the most dangerous tendency in society. Men naturally love to take vengeance into their own hands, and all the restraints of the law are insufficient effectually to suppress the outbreaks of their passions. But establish the rule which is contended for by the plaintiff in error, and the laws will never be resorted to for the redress of injuries by the strong; but they will take upon themselves to chastise those who offend them at pleasure, and rely upon proof of the provocation to mitigate the damages. It would also hold out temptations to a party to procure, by false testimony, proof of a former provocation.

Judgment affirmed.

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EVIDENCE OF PROVOCATION is not admissible to mitigate the damages in an action for assault and battery, unless the provocation was so recent and

immediate as to warrant the presumption that the assault was committed under the influence of the feeling excited by it, and evidence of acts and declarations of the plaintiff at a different time is not therefore admissible: *Lee v. Woolsey*, 10 Am. Dec. 230. Evidence that on divers previous occasions the plaintiff slandered and abused the defendant will not be received, but it must appear that the provocation was so freshly given that the passion excited by it had not time to cool: *Fullerton v. Warrick*, 19 Id. 99. So on an indictment for an assault the defendant can not give evidence in mitigation of the fine that the plaintiff used provoking and abusive language of and to him on days previous to the assault: *Rawlings v. Commonwealth*, 19 Id. 757.

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### GILLESPIE v. BRADFORD.

[7 YERGER, 163.]

**VENDOR'S LIEN FOR THE UNPAID PURCHASE MONEY** of land which he has given a bond to convey, overreaches the lien of any subsequent judgment creditor of, or purchaser from, the vendee.

**MECHANIC'S LIEN UNDER THE STATUTES OF 1825**, for improvements erected on land, under a contract with a purchaser holding a bond for a conveyance, is subordinate to the vendor's lien for the unpaid purchase money.

**BILL** to enforce a mechanic's lien under the statutes of 1825, c. 57, and 1829, c. 26, for services performed in erecting a house under a contract with Raines, defendant, upon a certain lot purchased by the said Raines from Bradford, defendant. Raines had given Bradford his notes for the purchase money, which was yet unpaid, and had taken a bond for a conveyance, which was to be executed when the money was all paid. The question was, whether the plaintiff's lien would take precedence over the vendor's lien. The decree below was against the plaintiff on this point, and he appealed.

*H. L. Turney*, for the complainant.

*J. Campbell and Goodwin*, for the defendants.

By Court, CATRON, C. J. As complainant comes in to enforce the equity of Rolla P. Raines, it will be useful to inquire what relief Raines is entitled to by the general powers of the court; for we must take it, the legislature provided a lien in favor of builders with a view to the doctrine applicable to a court of equity, and that the well-settled principles governing the rights of vendors and purchasers, and the powers of the court specifically to decree the performance of contracts, was not overlooked.

If a contract has been entered into for the sale and purchase of land, by competent parties, and is in its nature and the cir-



cumstances of it unobjectionable, it is as much in the course of the court to enforce it, as it is to give damages at law: 9 Ves. 608; 1 Madd. 287. Long before Gillespie built for Raines, Bradford's lien existed. This lien he had a right to enforce by bill, causing the premises to be sold for the unpaid purchase money, regardless of appreciation, or depreciation of value at the date of the sale. This is the established doctrine and practice in equity in this state. Nor is a case recollected, since the English court of chancery first assumed jurisdiction, by bill and subpoena, to enforce contracts for the sale of land in specie, where the vendor was deprived of his legal title without having received the purchase money. Here Gillespie comes in on Raines' equity, and asks a specific decree on behalf of the vendee, to which the vendor submits, on being paid the price of the land, and until which is done, by the terms of the contract, as well as the settled law of the court, the contract can not be enforced: 3 Atk. 188. Has the legislature altered the law? Was it intended to put it into the power of an extravagant vendee to erect improvements on the land, that would cost more than it was worth thus improved, and give the builder a lien for the improvements, superior to that of the vendor, and destructive to his older equity? If so, the statute must be most explicit to this effect.

The statute of 1825 makes the substantive provision on the subject. It provides, "that, hereafter, when mechanics construct buildings upon any lot of ground in any town by special contract with the owners thereof, they shall have and possess a lien upon each building and the lot of ground thereto attached, not exceeding one acre, for the just value of his labor and materials furnished by such mechanic for constructing such house or houses; and the owner of such ground shall not be able to convey the same free from the said lien created by this act, nor shall the same be sold by legal process so as to avoid said lien, unless judgment is rendered before such building was commenced."

By the second section the lien is to continue one year after the building is completed, and until after the termination of any suit that may be brought to establish the purchaser's claim. This act only extended to cases where one person undertook the whole building. The act of 1829 amends that of 1825, and extends the lien separately to each person who may do part of the work or furnish part of the materials. This statute seems too plain for serious doubt to arise on its construction. Yet

such doubts have arisen, and the chancellor's decree has been appealed from, and the determination of this court required. We think the statute has reference to the existing title of him who has the building erected, such as it was when the improvement commenced. The mechanic's lien will hold good against a subsequent purchaser from the person who builds, and against a lien by a subsequent judgment against him, but has no reference to previous liens for purchase money unpaid by mortgage or judgment. The decree will be affirmed, with costs.

Decree affirmed.

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**PRIORITY OF VENDOR'S LIEN OVER LIENS ACQUIRED AGAINST THE VENDOR.**—The principal case is cited as an authority on this point in *Rhea v. Allison*, 3 Head, 180. It is cited also in *Fogg v. Rogers*, 2 Coldw. 294, to the point that since the English court of chancery first assumed jurisdiction to enforce specifically contracts for the sale of land, the vendor has never been deprived of his title without receiving payment of the purchase money. Where a judgment creditor of one who has only an equitable title in land by virtue of a contract of purchase, comes into equity after the return of his execution at law unsatisfied, to subject said land to sale for the payment of his claim, the court in decreeing such sale will direct the unpaid purchase money to be first paid out of the proceeds: *Cloud v. Hamilton*, 3 Yerg. 81.

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## REEVES AND HAYTER v. DOUGHERTY AND EWING.

[7 YERGER, 222.]

**STATUTE OF LIMITATIONS PROTECTS FRAUDULENT POSSESSION.**—The statute of limitations applies where possession was acquired by fraud.

**STATUTE OF LIMITATIONS IS A GOOD PLEA IN EQUITY** where it would be good at law if the suit had been brought there, except where there has been a fraudulent concealment of the cause of action.

**GRANTEE OF PROPERTY CONVEYED IN FRAUD OF CREDITORS MAY PLEAD THE STATUTE OF LIMITATIONS** to a bill filed by a creditor.

**STATUTE BEGINS TO RUN IN SUCH A CASE** when the grantee obtains possession.

**OBJECTION OF A WANT OF PROPER PARTIES**, if not taken in the court below by demurrer or otherwise, can not be raised in the supreme court.

**BILL** filed in 1831 by judgment creditors of John Dougherty, defendant, and George Dougherty, deceased, to subject to the payment of the said judgment, certain land, negroes, notes, debts, money, etc., and two watches which the bill alleged had been conveyed to the defendant Elizabeth Ewing by the said Doughertys, without consideration and in fraud of the creditors of the said Doughertys. The plaintiffs' judgment was recovered in 1824, by the plaintiff Reeves and one Faris, and Faris'

interest had been purchased by the plaintiff Hayter, and an execution on said judgment had been returned unsatisfied. The defendant Mrs. Ewing filed a separate answer and pleaded the statute of limitations, which plea, after argument, was overruled. In an amended bill the plaintiff alleged that the defendants fraudulently concealed the transfers of the property mentioned in the original bill, and that the same did not come to the plaintiff's knowledge, until within three years before the filing of the bill. In her amended answer, the defendant Ewing denied all the allegations of fraud and fraudulent concealment contained in the bill, and alleged in substance that the property in question was transferred to her in payment of certain indebtedness due her deceased husband, from the Doughertys, she being the executrix and sole legatee of her said husband. It appeared, from the pleadings and proofs, that a settlement of the indebtedness due from the Doughertys to the plaintiff's deceased husband was made by one Beatty in 1819, and that the property now in question, except the two watches, was transferred to her at that time. It further appeared that said property was more than sufficient to pay the whole of the said indebtedness. The watches were transferred to the defendant Ewing by John Dougherty in 1830, after the death of George Dougherty. The evidence tended to establish fraud in the transfers made to the defendant Ewing. The other facts, so far as material to the points decided by the supreme court, are sufficiently stated in the opinion of the chief justice. The bill was taken as confessed against the defendant John Dougherty, and a decree was rendered at the hearing against the defendant Ewing, from which she appealed.

*H. L. Turney and Goodwin*, for the plaintiffs.

*Rucks and Isaacs*, for the defendants.

CATRON, C. J. To give an account of the receipt of notes, money, etc., Mrs. Ewing pleads the statute of limitations. The principal question is, does it apply in cases where the possession has been acquired by fraud? This is the well-settled rule at law: *Cocke and Jack v. McGinnis*, Mart. & Y. 361 [17 Am. Dec. 809]; *Porter's Lessee v. Cocke*, Peck, 41. Generally, not to say in all cases, where the legal right has been barred by the legislature, and the remedy in the courts of law cut off, the equitable right and remedy in the courts of chancery to the same thing have been holden to be concluded by the same bar. And although the act of limitations applies

by its terms only to suits at law, and has been applied in a court of equity by analogy, yet this court proceeds upon principles as fixed and certain as the courts of law do; and of these settled principles one is, that the act of limitations is a good plea, where, if the suit had been at law, the plea would be good, except in cases of a fraudulent concealment of the cause of action: Peck, 43, 46; 3 Yerg. 232; 17 Ves. 96; 7 Johns. Ch. 122; 1 Madd. 205.

The object here is to aid an execution at law; to give effect to a legal writ and legal right, because of the concurrent jurisdiction in equity; to relieve against the fraudulent conveyance tending to hinder the creditor of the grantor. There being no express trust by contract between Dougherty and Mrs. Ewing, time would bar Dougherty. The complainants come in asserting Dougherty's right to the property, treating (as they have a right to do) the fraudulent conveyance as merely void. Had he the same right (which the statute prohibits to him), would he be barred by the adverse possession of three years? As to the slaves, this court held, in *Kegler v. Miles*, Mart. & Y. 426 [17 Am. Dec. 819], that three years' adverse possession conferred a good title, on which the possessor for three years might recover from the former owner. As to these, Dougherty's right of property was gone when the bill was filed, and the complainants are equally barred.

The other personal property possessed by Mrs. Ewing for more than three years before suit brought, it is insisted is yet the property of Dougherty. Mrs. Ewing's possession barred any remedy he had; the complainants come in to enforce his remedy, and must abide by his title to recover, and are equally barred. There is no fair distinction between the case of lien by execution and a lien by an implied trust, otherwise arising. The cause of *Campbell v. Armstrong*, 3 Yerg. 232, furnishes a fair instance. Campbell held possession of land warrants by express trust; as to him, Armstrong's heirs were not barred. His possession was deemed consistent with their right. But Trimble claimed by purchase from Campbell; the court declared him to be a trustee by implication, and would have protected his title by the statute of limitations had he retained it. So here the judgment formed a lien on the personal property of Dougherty, and he held possession in the nature of an express trustee for the creditors.

But Mrs. Ewing was no party to the judgment; she is pursued, and her legal title (*prima facie* valid) is challenged on the

ground that she paid no consideration, and aided in the fraud, and therefore she holds as a trustee by implication for those having a right to stand in Dougherty's stead. Her title is just as capable of being protected as was that of Cocke in the case of *Porter v. Cocke*. His deed was voluntary and void as to creditors, yet adverse possession protected the title. In *Jack and Cocke v. McGinnis*, an express trustee, holding by parol contract, and sued at law, was protected on the best settled principles. That Mrs. Ewing is entitled to avail herself of the statute, from the nature of the title by which she claims to hold, is clear; but the difficulty is, when does the act of limitations commence its operation in her favor, as against the complainants. If from the time when the judgment was obtained, as is insisted, society would have no repose under such circumstances. To hold thus, and then apply the principle asserted in *Reed v. Staton*,<sup>1</sup> 3 Hayw. 160, that a vendee from a fraudulent vendee took no title, which, as to the creditors of the fraudulent vendor, rested with him, the evil consequences would be very great. There is no principle upon which to rest the bar other than the one stated, that the creditors must take the title as it stands between the fraudulent vendor and vendee, at the time he files his bill or levies his execution. If time has confirmed the title to lands or slaves, or barred the remedy to recover other goods, it is in accordance with the established policy of the country, that the general repose of society is preferred to the few chance cases of hardship which the general rule inflicts. Here Dougherty kept the complainants in litigation for more than three years, and Mrs. Ewing, the fraudulent vendee, might have profited by it. But had her title been fair, she might have been unable to prove it after the lapse of time, for it was over eleven years after she took her title and possession before she was sued; and sub-purchasers from her would still more need the protection of the statute. In truth, the time to form the bar is too short for our advanced state of society. In countries where the time to form the bar is five or six years, cases of hardship can rarely occur.

But the remedy of the evil, if evil there be, is with the legislature, not the courts; we are bound to apply the law as we find it, without repealing it, in effect, by making exceptions. This the court declared it had no power to do in *Cocke and Jack v. McGinnis*, and a stronger temptation to judicial legislation can hardly present itself. We adjudge the plea of the statute of

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1. *Reed v. Staton*, 3 Hayw. 160; S. C., 9 Am. Dec. 740.

limitations to the original bill to have been a good defense, save as to the watches first possessed by Mrs. Ewing shortly before this bill was filed.

An amendment alleges the concealment of the fraud until within three years next before the filing of the bill. This is denied by the answer, and not proved on the part of complainants, or any facts from which it may be inferred. The transactions were all open and subject to be known.

In June, 1819, Martin Beatty made a settlement between the Doughertys and Mrs. Ewing. They fell one thousand and thirty-six dollars in her debt, and executed their note for this sum. In 1830, there is a credit indorsed on this note for two watches, the one left by George Dougherty at his death, at one hundred and sixty dollars, and John's, at two hundred and twenty-five dollars. The complainants call on the defendant, Mrs. Ewing, to disclose the property of John and George Dougherty, which they allege she fraudulently conceals. They charge that Mrs. Ewing had placed in her hands a large amount of money, notes, and effects of the firm, for the purpose of covering the same from the creditors. She admits she had assigned to her a large number of notes and debts, etc., as stated in the complainant's bill, all of which were not of sufficient value to pay and satisfy the *bona fide* claims which she, as executrix of her husband, had against the said John and George Dougherty. Mrs. Ewing held two notes, as executrix of Nathaniel Ewing, one for one thousand and thirty-six dollars, and another for eight hundred and sixty dollars. The latter was discharged by the household furniture, and which did not cover it. For the one thousand and thirty-six dollars, a mortgage was given on the Patterson tract of land. Her lien purports to have been for eighteen hundred dollars, but for the amount over the note it was colorable.

The vendor of the land to the Doughertys had a prior lien by judgment for part of the purchase money, and Mrs. Ewing bought it in at execution sale for about one thousand dollars, to give effect to her lien. She afterwards sold it for some thirty-six hundred dollars. That by this means and others, this note was extinguished is manifest. The evidence is found in the bill and answer. The bill alleges, that John and George Dougherty, as merchants, had acquired much property, and were doing a large business; that they pretended to fail; and to defeat their creditors, and that without consideration, said John assigned and transferred all the property that they then owned,

that could be reached by execution, to said Elizabeth Ewing. Amongst the property thus transferred were twenty or thirty negroes, etc. That at the time he pretended to fail, he had on hand a large amount of money, debts and notes due the firm, which were also handed over to the said Elizabeth, and which she has long since collected, etc. That Mrs. Ewing received the notes and debts she admits, but pleads the act of limitations to the discovery of the amount. We will take it there was abundance to extinguish the note for one thousand and thirty-six dollars, this being the only debt due her from the Doughertys, as executrix of Nathaniel Ewing. The defendant, Mrs. Ewing, has then in her possession two gold watches, which she received without consideration, and which are subject to the satisfaction of the judgment of the complainants.

It will be well not to overlook several objections made in argument. The first is on part of the defendants, that Thomas Faris, one of the joint judgment creditors and plaintiff at law, is not before the court, but his assignee, Hayter, who as assignee, has no right to enforce the execution at law by bill. The assignment to Hayter is proved by the assignor; no objection was made below for want of parties, by demurrer or otherwise, and we think it is not proper now to dismiss the bill on this ground.

The complainants object, that the possession of the property by Mrs. Ewing has not been adverse to Dougherty, that they lived in the same house, and jointly exercised ownership over it, and Mrs. Ewing's name was merely used as a cover. The proof of adverse possession by Mrs. Ewing is satisfactory.

The decree will be reversed and the watches ordered to be sold.

PERC, J. The question of the statute of limitations, as presented in this case and before this court, is not void of difficulty. Taking it for true, that the bar by limitations may be avoided by showing concealment of the fact of fraud in the transfer of the property, and that proof of the concealment must come from him making the averment, still enough has been shown by the complainant to insist that he shall not be barred.

In such a case, full and conclusive proof of the concealment is not to be expected: at most, *prima facie* evidence is all that should be required. That evidence is before us in the return on the execution. It was the duty of the sheriff to find property, and here, in a case where so recently Dougherty held property more than sufficient to satisfy the demand, owing to a

concealment by color of right in another, he, by the concealment, has no alternative but to return *nulla bona*; the sheriff is not compelled to run the hazard of a trespass by seizure of the property, nor is the plaintiff bound to give a bond of indemnity. When, therefore, the sheriff returns the fact of nothing found, we look to that return, in connection with the other facts of fraud proved in the case, and the mind, by the return itself, is brought to the conclusion that such a return, by an officer on oath, could not have been made if the concealment had not existed. It is the very best evidence of the concealment where the fraud is proved; because, but for that concealment the execution, which is called the life of the law, would, in the hands of him acting on oath, have been effectual.

Thus, I conclude, by the return of the execution we are put upon the inquiry as to the fraud, and if it is proved to exist, then the bar by the statute of limitations is out of the way. If this be not so, then are creditors helpless, and the whole of our laws made to prevent frauds lifeless. The inquiry in this case, in my opinion, should be conducted further than to the watches only.

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LIMITATIONS IN EQUITY.—See on this point the note to *Frame v. Kenny*, 12 Am. Dec. 368. See also *Cocke v. McGinnis*, 17 Id. 809, and *Wanmaker v. Van Buskirk*, 23 Id. 748, and other cases in the American Decisions collected in the notes thereto, and also *Johnson v. Cooper*, 24 Id. 502, and *Coltard's Adm'r v. Tuttle*, Id. 627.

CASES OF FRAUD ARE AS MUCH WITHIN THE STATUTE OF LIMITATIONS, generally, as any other: *Shelby v. Shelby*, 5 Am. Dec. 686. But see *App v. Dreisbach*, 21 Id. 447. Adverse possession under a fraudulent conveyance for the statutory time is a good defense not only against the grantor, but against his creditors: *Porter v. Cocke*, Peck, 30. So held also in *Knight v. Jordan*, 6 Humph. 101; *Mulloy v. Paul*, 2 Tenn. Ch. 156, the latter case citing and approving *Reeves v. Dougherty*. See also *Tubb v. Williams*, 7 Humph. 367, recognizing the same doctrine.

STATUTE BEGINS TO RUN, WHEN, IN SUCH CASES.—In *Jones v. Read*, 1 Humph. 335, it was held contrary to the doctrine of the principal case, that the statute of limitations begins to run in favor of a fraudulent vendee, as against a bill filed by a judgment creditor of the grantor to subject the property to payment of his judgment from the time of the recovery of such judgment. Green, J., refers, in that case, to what is said in *Reeves v. Dougherty* on this point as *dictum*. In reply to an argument of counsel, that the statute commenced running from the date of the fraudulent conveyance, he said: "The case of *Reeves v. Dougherty*, 7 Yerg. 222, which is relied on to support this position, does not support the argument. That was a case where the negroes, to subject which the bill was brought, were in the possession of Mrs. Ewing more than three years after the judgment and execution at law, and consequently more than three years after the right to file the bill accrued. The only question therefore was, whether the statute would run in



favor of a possession, and operate to protect a title acquired by fraud. The court decided in accordance with all the modern authorities that it would. It is true, one member of the court, in delivering his opinion, indicates that the statute would run in favor of the possession of a slave from the time possession should be taken, although no right of action existed in favor of any one until long after. But this was a loose *dictum* of one judge only upon a question not existing in the case, and clearly against the plain language of the act of 1715, c. 27, sec. 5."

The doctrine of *Jones v. Read* on this point was approved in *Marr v. Rucker*, 1 Humph. 348, a case decided at the same term. On the other hand, in *Knight v. Jordan*, 6 Humph. 101, the statute was held to run in favor of an adverse possession under a void gift as against creditors of the donor from the time of taking possession, and Reese, J., delivering the opinion, said, that the general principle was so well established, that the decision in *Jones v. Read* could not unsettle or shake it. In *Mulloy v. Paul*, 2 Tenn. Ch. 156, the chancellor reviews all the previous Tennessee decisions on this point, and, while admitting that the point is not entirely settled, expresses his approval of the rule laid down in *Reeves v. Dougherty*. He says: "It will be seen from this review of the cases, that the question as to the point of time when the statute of limitations begins to run, in favor of a fraudulent vendee of land against the creditors of the vendor, can not be considered as positively settled by the decisions. There is, it is true, a direct decision, that it begins to run only from the date of the judgment, in *Jones v. Read*. But the decision is somewhat shaken by the subsequent reference to it in *Knight v. Jordan*. Moreover, when we seek to ascertain the principles which underlie the decisions, it is clear that *Reeves v. Dougherty* and *Knight v. Jordan* have the better basis. *Jones v. Read* rests upon a literal and forced construction of the second section of the act of 1819." This subject is now regulated by statute in Tennessee. By section 4288 of the code, it is provided that "any creditor, without first having obtained a judgment at law, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and subject the property, by sale or otherwise, to the satisfaction of the debt." By section 4293, it is further provided that "in no case shall the limitation of actions be held to commence running in favor of a fraudulent or voluntary possessor, until the creditor to be affected by the fraudulent or voluntary conveyance, has a right of action to test the validity of such conveyance." These statutory provisions, as the chancellor shows in *Mulloy v. Paul*, referred to above, remedy the supposed hardship which gave rise to the decision in *Jones v. Read*, 1 Humph. 335.

WHERE THERE IS FRAUDULENT CONCEALMENT of the cause of action by the defendant, the statute of limitations does not begin to run until the fraud is discovered: *First Massachusetts Turnpike Corp. v. Field*, 3 Am. Dec. 124 and note; *Shelby v. Shelby*, 5 Id. 686; *Homer v. Fish*, 11 Id. 218 and note. So held, citing the principal case, in *Smart v. Waterhouse*, 10 Yerg. 105, and *McLain v. Ferrell*, 1 Swan, 53. The general rule is, that the statute begins to run from the time the cause of action accrues, and not from its discovery: *Thomas v. White*, 14 Am. Dec. 56; *Kerns v. Schoonmaker*, 22 Id. 757.

## MCALISTER'S ADM'RS v. SCRICE.

[7 YERGER, 277.]

CLERK TAKING A DEFECTIVE APPEAL BOND IS NOT LIABLE therefor to an action by the appellee, because the act is necessarily done in the presence, and presumably under the direction and to the satisfaction, of the court.

ACTION on the bond of the defendant as clerk of the county court for taking a defective appeal bond, in a case wherein the plaintiff had recovered judgment in said court, so that the plaintiff had lost his remedy against the sureties on said appeal bond. Demurrer to the declaration, which was sustained, and the plaintiffs brought error.

*John A. McKinney*, for the plaintiffs in error.

*Kennedy*, for the defendant in error.

By Court, *PERC*, J. The breach of the condition of the bond grows out of an act which the clerk was necessarily bound to do in the presence of the court; and if not done under the guidance of the judge, was, at least, *prima facie*, done by his assent. It is, therefore, an inference in favor of the clerk, that the court, before granting the appeal, was satisfied with the bond; because the bond is a prerequisite to granting the appeal: Act 1794, c. 1.

There are many acts which clerks are necessarily bound to do out of term time; acts in which judgment and skill are requisite to be exercised. In these, should the clerk act culpably, negligently, or oppressively, to the injury of those he is bound to act for, he would be held amenable; his duty having to be executed partly ministerially and partly judicially; and sometimes the same act partaking of both these characters. It would be difficult to point out the cases in which the law would excuse him for an error in judgment; but in the case before us we have no doubt the parties were present in court, both plaintiff and defendant. The bond is presumed to have been taken in presence of the court as well as of the parties. It was subject to objections, and the mind of the court could have been called, not only to the form, but to the sufficiency of the bond, and of the securities offered; or that the clerk, in taking it, violated his duty.

Seeing, by the act of assembly, that the party appealing had to tender a sufficient bond, before the court would grant the appeal, and the granting the appeal being a judicial act, on

which the mind of the court had to operate, it follows, that the judge was satisfied with the performance of all the prerequisites to allowing such appeal. The plaintiffs make out no cause of action.

Judgment affirmed.

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The foregoing decision is cited in *Davis v. Dyer*, 5 Sneed, 680, and *McPhatridge v. Gregg*, 4 Coldw. 326, as an authority for the position, that the pauper oath required upon an appeal *in forma pauperis* being a substitute for an appeal bond, must be taken in open court, and that if not so taken the appeal must be dismissed. In *McCarver v. Jenkins*, 3 Heisk. 633, the case is cited also as to the effect of taking an appeal bond otherwise than as provided by law. It is referred to also in *Andrews v. Page*, 3 Heisk. 639, as an authority for the position that there are many acts which clerks and masters are required to do out of court, which are partly judicial and partly ministerial, and when done by express orders of the court are presumed to have been done in the presence of the court.

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## NICHOL AND HILL v. BATE.

[7 YERGER, 305.]

**HOLDER IS NOT BOUND TO KNOW THE PLACE OF RESIDENCE** of the indorser of a note for the purpose of giving him notice in order to charge him.

**WHERE THE HOLDER USES DUE DILIGENCE** to ascertain the indorser's place of residence, and from information thus obtained sends the notice to the wrong post-office, it is nevertheless sufficient.

**DUE DILIGENCE IS A QUESTION FOR THE JURY** in such a case.

**ACTION** by the indorsees against Bate, the indorser of a certain note. The notice was sent through the mail addressed to the defendant at Cairo, a post-office about five miles from his residence, at which he occasionally received letters, though there was another post-office within a mile and a half of his residence. The notice in question was delivered to him by the postmaster at Cairo, a week or two after it was sent. There was evidence tending to show that before sending the notice to Cairo, the notary who protested the note made inquiry of many persons as to Bate's residence, and from the information thus obtained, was led to believe that Cairo was his nearest post-office. The judge declined to give certain instructions asked by the plaintiff, and gave instead certain other instructions with respect to the plaintiff's duty to ascertain the defendant's residence. The instructions given and the instructions refused, so far as material to the point decided in the supreme court, are stated in the opinion. Verdict for the defendant, new trial

refused, and judgment on the verdict, to reverse which the plaintiffs brought error.

*F. B. Fogg*, for the plaintiffs in error.

*J. Rucks*, for the defendant in error.

By Court, GREEN, J. In this case the counsel for the plaintiff below requested the court, among other things, to charge: "That if the notary public and the holders of the note were ignorant of the place of residence of the defendant, at the time it became due, and used due diligence to ascertain the same, and notice was then sent to the post-office believed to be nearest, according to that information, it would be sufficient, although it might turn out, in point of fact, that they were mistaken."

This charge the court refused to give, but told the jury, in the conclusion of the charge, that "it was the duty of Nichol, Hill & Co. to have known where Bate lived, and given information to the notary; that wrong information in this case, would not excuse."

We are of opinion that the court erred in this charge to the jury. Personal knowledge, on the part of the holder of a bill, of the place of residence of an indorser, can not, in many cases, be obtained. The party must of necessity rely on the information of others. If it were to be settled as the law, that although the holder of a bill may have sought diligently to ascertain from the most correct sources the residence of an indorser, and the post-office to which his residence is nearest, nevertheless, if his information should be erroneous, and upon such wrong information he should direct the notice to the wrong post-office, it is to be considered as no notice to the indorser, who is thereby released, the circulation of negotiable paper would be very much restricted, and commerce would seriously suffer. But such is not the law, although in the case of *Davis v. Williams*, in Peck's reports,<sup>1</sup> some strong language is used, tending to such a conclusion; yet we are to understand it in reference to the facts of that case, and not as assuming the general principle, that the holder is bound to know the residence of the indorser, and the proper post-office to which the notice should be directed. In the case of *Chapman v. Lipscombe and Powell*, 1 Johns. 294, the indorser lived in Petersburg, Virginia, the bill being payable in New York, where it was protested for non-payment. The clerk of the notary inquired at

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1. 1 Peck. 191.

the banks and elsewhere, for the residence of the indorser, and was informed they resided at Norfolk, Virginia, and the notice was sent to them at that place. The court say, "this is sufficient, and all that ought to be required. He has used due diligence." It is also laid down in *Chitty on Bills*, 213, 214, that where the residence of the indorser is unknown, a notice sent to a wrong post-office will be sufficient, provided due diligence be used to ascertain the right place. So this court held in the case of *Dunlap v. Thompson and Drennan*, 5 Yerg. 67.

But it is said this doctrine will apply where the residence of an indorser is uncertain, not where it is fixed and known. There is no such distinction in the books. I suppose in the case of *Chapman v. Lipscombe and Powell*, the residence of the defendants was fixed at Petersburg, and, by those acquainted with their place of residence, was known to be there; nevertheless, it being unknown to the plaintiff, and due diligence having been used to ascertain it, the notice to Norfolk was deemed sufficient.

It is insisted in the argument, that although the charge of the judge may have been incorrect, had the language been used without reference to the particular facts of this case, yet that when applied to the case in this record it is not erroneous because the proofs do not show that the plaintiffs below used due diligence to ascertain the residence of the defendants, which information might have been easily obtained, and not having done so, wrong information would not excuse, but the plaintiffs were bound to know where Bate lived.

According to this argument, the court took the cause entirely from the jury, and decided the whole cause, the fact as well as the law. This would have been error. The fact whether there had been due diligence used to ascertain the residence of the defendant, was a matter for the jury to determine from the evidence; the question of law, whether if due diligence were used to ascertain the residence, and if in consequence of misinformation, the notice were sent to a wrong place, it would be sufficient, was to be determined by the court. The charge is therefore wrong, whether it be understood as assuming the abstract principle, that a holder of a bill is bound to know the residence of the indorser, and that wrong information, upon diligent inquiry, will not excuse; or whether the judge intended to assume, that in this case due diligence had not been used, and that therefore, the wrong information received would not excuse.

It is not necessary to determine whether the evidence in this record presents a case where the plaintiff used due diligence or not; it is enough that there was evidence upon the point before the jury; that the question of fact was fairly made, and that it ought to have been left to the jury upon a proper charge.

The judgment ought, therefore, in my opinion, to be reversed, and the cause remanded for another trial.

PECK, J., concurred.

Judgment reversed.

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WHERE NOTICE IS SENT BY MAIL DIRECTED to the indorser at the place where, after diligent inquiry, the notary has been informed that such indorser resides, and where he often receives letters, it is sufficient, though in fact the indorser does not reside at that place: *Reid v. Payne*, 8 Am. Dec. 311; see, also, *Bank of Columbia v. Magruder*, 14 Id. 271. Notice may be sent to the post-office where the indorser is most likely to receive it at the earliest moment, instead of the post-office nearest his residence: *Bank of United States v. Lane*, Id. 595. Notice addressed to an indorser at a city generally where he was accustomed to pass part of his time, receiving letters and messages at a particular place therein, was held sufficient to support a verdict for the holder, though the indorser resided nine miles from the city, and there was no proof that the city post-office was the one nearest his residence: *Gist v. Lybrand*, 17 Id. 595.

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## TAUL v. CAMPBELL.

[7 YERGER, 519.]

CONVEYANCE TO A HUSBAND AND WIFE in fee vests in them an indivisible estate, which, after the death of one, continues solely in the survivor, and no part thereof descends to the heirs of the one first dying.

CONVEYANCE PROVED AND REGISTERED UNDER THE ACT OF 1715, though not founded on a valuable consideration, has the same effect as a deed of bargain and sale or feoffment would have had before that act.

EJECTMENT, brought by the heirs-at-law of Caroline Taul, deceased, against the devisees of Thomas P. Taul, deceased, to recover a moiety of certain premises. By an agreed case between the parties, it appeared that the said Thomas P. Taul and the said Caroline Taul were husband and wife; that before their marriage, the premises were devised to the said Caroline in fee; that after their marriage, the said Taul and wife conveyed the premises by a deed of bargain and sale to one Deckard, who, on the following day, by a deed proved and registered under the act of 1715, sold and conveyed the same premises to Thomas P. Taul and Caroline his wife. Caroline

died in August, 1828, leaving the lessors of the plaintiff her heirs-at-law. Thomas P. Taul died in August, 1829, having previously made his will, devising all his real and personal estate to the defendants. The principal question was, whether, upon the death of Caroline, a moiety of the premises descended to her heir-at-law, or whether the whole estate vested in the survivor and passed to the defendants as his devisees. A question was also made, as to the effect of the conveyance from Deckard to Taul and wife, and as to the sufficiency of the certificate of acknowledgment of that conveyance. It is not deemed necessary, however, to set out the certificate of acknowledgment, as nothing is said in the opinion as to the plaintiff's objection to it. Judgment was rendered below in favor of the plaintiff, and the defendants prosecuted their appeal in the nature of a writ of error.

*J. Rucks and G. S. Yerger*, for the plaintiffs in error.

*W. E. Anderson*, for the defendant in error.

By Court, CATRON, C. J. The court is of opinion, that the statute of descents of 1784, does vest in the heir every estate in fee simple that passes from any person who dies seised, whether such estate be of inheritance or not at the common law, as was holden by Judge Catron in *Campbell v. Taul*, 3 Yerg. 561. This is admitted on the part of Taul's devisees, but it is insisted, that an estate vested in husband and wife is a single, indivisible title; that the husband and wife are known in law as only one person; that they are a unit by the common law; and if an estate be granted to A. and his wife, and to B., the husband and wife take one moiety, and B. the other; and when either husband or wife die, the longest liver takes the estate.

That the estate goes to the longest liver, and the heirs of the longest liver, by the common law, is admitted by the other side; but that this is grounded on a rule of survivorship of a peculiar character, is insisted, and that when the wife died, her estate did pass, not to the husband, but by the statute of descent to the wife's heirs. If any title passed by the death, it is admitted, the statute of descents cast it on the heir.

To prove the wife had a descendible estate, *Greneley's case*, 8 Rep. 71, is mainly relied upon. The question there was, whether the husband could do any act during the coverture to prejudice the wife's title. The statute of 32 Hen. VIII. having declared that no fine, feoffment, or other act or acts hereafter to be made, suffered, or done by the husband only, of any

manors, lands, tenements, or hereditaments, being the inheritance or freehold of his wife, during the coverture between them, shall in any wise be or make any discontinuance, or be prejudicial or hurtful to said wife or her heirs, etc.; and the court held, "that this joint estate was within these words (the inheritance or freehold of his wife), for she hath a freeholder's inheritance in the land, although she hath not the sole freehold or inheritance." And again, in the same case, it is resolved, "but if the husband aliens, and afterwards the wife is divorced, *causa precontractus*, or any other divorce which dissolves the marriage *a vinculo matrimonii*, then the wife, during the husband's life, may enter," etc.

The effect of a deed for land to husband and wife has been settled beyond controversy by the common law for centuries. They take but one estate, as a corporation would take, being by the common law deemed but one person; and if one die, the estate continues in the survivor, the same as if a corporator were to die: Co. Lit. 187, b; 2 Bl. Com. 182; 2 Kent Com. 132. And if an estate be conveyed to husband and wife, and to a third person, the husband and wife only take the one moiety, and the third person the other moiety: Co. Lit. 187, a. Nothing passes on the death of either the husband or wife, that may first die, but by a condition in law, the longest liver takes the entire estate: Co. Lit. 234, b. Such has been the recognized rule of the common law in the American courts. Thus in Massachusetts (5 Mass. 521), Jacob Hearsy conveyed in fee to Thomas Hearsy and Mary his wife; Mary died in 1801, the husband living. In 1804, his will devised the lands to Sylvanus and Cyrus Hearsy in fee. Shaw and others were the heirs of Mary, the wife, and as such, claimed a moiety of the premises as tenants in common with the devisees of the husband, relying on the statute of Massachusetts, changing joint tenancies into tenancies in common; in effect, cutting off survivorship in certain cases.

The court declared that joint tenants held by moieties, not entireties, as did husband and wife, that no severance could be had by either husband or wife, and that the alienation of the husband would not defeat the wife's title to the whole, if she survived him; that the conveyance to husband and wife is, in legal construction, a conveyance but to one person; and that Thomas Hearsy, on the death of his wife, took the whole estate, wherefore the title of his devisees was sustained. The cause was like the one before the court in all its features.

So in New York (16 Johns. 115). Mary Stevens, widow,



married Justus Blanchard, holding lands in fee under the will of her former husband. Blanchard and wife conveyed the lands to Philo Ruggles, who reconveyed to Blanchard and wife jointly. Blanchard survived his wife, and the question was, whether he became entitled to the whole estate which they both had in the farm, or only to a moiety of it. The court said: "It appears to be well settled, that if an estate be given to a man and his wife, they take neither as joint tenants nor tenants in common; for, being considered as one person in law, they can not take by moieties, but both are seised of the entirety; the consequence of which is, that neither of them can dispose of any part without the assent of the other, but the whole goes to the survivor." 2 Bl. Com. 133; Co. Lit. 187; 2 Vern. 120, are recognized as furnishing the settled rule of property.

The legal effect of this description of conveyance is declared by Chancellor Kent in *Rogers v. Benson*, 5 Johns. Ch. 427, with his usual accuracy. He says: "The husband and wife in this case were not properly joint tenants, or tenants in common, for they were but one person in law, and could not take by moieties. They were both seised of the entirety, and neither could sell without the consent of the other, and the survivor would take the whole. The same words of conveyance, which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. This is a nice distinction laid down in the old books, and which has continued to be the law to this day, and the provision in our statute, that no estate in joint tenancy shall be held under any grant or conveyance, unless the premises were expressly declared to pass, not in tenancy in common, but in joint tenancy, does not reach this case, for the estate of the husband and wife is not a joint tenancy."

The same has been holden in Virginia in *Thornton v. Thornton*, 3 Rand. 179. John A. Thornton made his will, giving to his brother-in-law, Francis Thornton, and Jane, his wife, certain lands in fee, and died. Jane Thornton died in the lifetime of her husband, and her children and heirs sued the husband for the moiety of the land, insisting it descended to them on the death of their mother.

The court held that an estate given to the husband and wife is not a joint tenancy, and therefore not affected by the act of assembly concerning joint rights and obligations. In such an estate each party takes the entirety, and the survivor takes the whole, not by survivorship, but by virtue of the original conveyance.

In May, 1833, the same question came before the supreme court of Kentucky, in the case of *Rogers v. Grider*<sup>1</sup> (published in the Commonwealth newspaper of twenty-ninth of June, 1833). Robert Moore conveyed a tract of land, adjoining Bowling Green, to his son-in-law and daughter, Martin Grider and wife, which was afterwards sold under executions against Grider, in his life-time, and Rogers became the purchaser. After Grider's death, Mrs. Grider filed her bill against Rogers, claiming, first, the whole of the land, and if she was not entitled to the whole, then to one moiety to be allotted to her in severalty, and dower out of the other moiety. It was insisted for the purchaser, that Grider and wife took as joint tenants, and that by the statute of Kentucky destroying joint tenancies, Mrs. Grider could only take a moiety. The court, after stating what the ancient common law was, declare, "that one of the incidents of a joint tenancy was the right of each of the joint tenants to alienate his interest, thereby to sever the joint tenancy, and render his co-tenant in common with the alienee; whereas, it is agreed by all the authorities, that neither husband nor wife can, by common law, make any alienation of an estate conveyed to them during coverture, so as to affect the entire right of the other on his or her surviving. The unity of person subsisting between man and wife, in legal contemplation, prevents their receiving separate interests. The estate of joint tenants, is an unit made up of divisible parts, subsisting in different natural persons. The estate of husband and wife is an unit, not made up of any divisible parts, subsisting in different natural persons, but is an indivisible whole, vested in two persons, who are actually distinct, yet who, according to legal intendment, are one and the same. On the death of husband or wife, the survivor takes no new estate or interest, nothing that was not in him or her before. It is a mere change in the properties of the legal person holding, not of the estate holden."

The result of the British and American decisions is the same, without an exception, that husband and wife take one indivisible estate, which continues after the death of either natural person, the same estate in the survivor; consequently the deed on which this controversy arises, has the same legal effect as if it had been made by Deckard, to Taul and wife, to hold to them jointly and inseparably, during their joint lives, and on the death of either, that the estate should go to the longest liver, and his or her heirs forever.

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1. 1 Dana, 242.

No estate passed on the death of Mrs. Taul to her heirs, for the statute of descents to operate upon; nor has the statute any bearing on the true and only question in this cause, the character of the title, Mrs. Taul died seised of; and, in supposing it had, Judge Catron was clearly mistaken in the opinion he expressed in *Campbell v. Taul*, at Sparta. He took it for granted that Mrs. Taul had a fee-simple estate; whereas it had annexed to it, a condition in law, that it should continue over to the longest liver. Unexplained, and without careful examination, *Greneley's case* is calculated to lead to error. It is therein resolved, that after the divorce, the wife may enter as a joint tenant, with the husband: 8 Rep. 71; but this, when examined, proceeds upon reasons too plain to be controverted. Lord Coke refers to a divorce, *a vinculo matrimonii*, which declares the marriage null and void, and, in England, is so declared by the spiritual court. The causes of divorce are such, in England, as existed previous to, and prohibited the marriage, and made it unlawful and void from the beginning. The issue of such marriage are bastards; the divorced woman is taken as never having been married; and for the personal property in the husband's hands, that he obtained from her, she may bring detinue; and any conveyance of lands made jointly during the coverture to the supposed husband and wife, vested in fact in joint tenancy, as in other cases: 1 Bl. Com. 440; Jac. L. D., Divorce. The spiritual court having declared a marriage void, the common law courts generally take no notice of the fact that a marriage had ever existed; yet this general rule had the exception made to it as declared in *Greneley's case*, that the statute of 32 Henry VIII. protected the wife *de facto* against the acts of the husband, done before the divorce was pronounced, as where he had sold and parted with the possession of the wife's lands.

Our statute (1799, c. 19) confers the jurisdiction to grant divorces on the common law courts, and the divorce may be grounded on causes arising subsequent to the marriage; but the tenth section of the act makes it the duty of the court to decree to the divorced wife such portion of the real and personal property of the husband as is consistent with the nature of the case, and order it to be partitioned to her. No considerations can be drawn from the doctrine of divorces, in any wise coming in conflict with the established principles giving effect to joint deeds, to husbands and wives, as single and indivisible titles.

The next question is, has a conveyance of land, proved and

registered, any different effect by force of the act of 1715, c. 38, than a feoffment, or bargain and sale grounded on a valuable consideration had, before the act was passed? It declares no conveyance for lands shall be good and available in law, unless proved and registered; and that all deeds so done and executed shall be valid and pass estates in lands, without livery of seisin, attornment, or other ceremony in the law whatsoever.

The ceremonies referred to, and which, by the common law, were necessary to vest a title in the grantee, are stated by the court in *Thomas v. Blackmore*, 5 Yerg. 124, and will not be repeated. The act of 1715 dispensed with the necessity of an actual delivery of possession to the purchaser, and with the assent of the tenant, if any, to the change of landlords; nor is it necessary the deed should be grounded on a valuable consideration to give effect to it by force of the statute of uses; for all these, the registration is a substitute: 2 Tenn. 264; and the title vests without their observance; but when vested, the effect of the deed, and the character of the title taken, is the same as a deed of bargain and sale, or feoffment, would have conferred before the passage of the act of 1715. The court is therefore of opinion, that judgment on the case agreed must be entered for the defendants.

GREEN, J., gave no opinion.

Judgment accordingly.

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CONVEYANCE TO HUSBAND AND WIFE after marriage renders them, not joint tenants or tenants in common, but tenants of the entirety: *Den v. Hardenbergh*, 18 Am. Dec. 371, and *Doe v. Howland*, Id. 445, and notes thereto. The note to *Den v. Hardenbergh* contains an extended discussion of this subject. In *Johnson v. Lusk*, 6 Coldw. 116, *Taul v. Campbell* is cited to the point that where an estate has been conveyed to a husband and wife, the longest liver of them takes the entire estate; and it is held, upon the same principle, that a note payable to a husband and wife survives to the wife if she outlives her husband, unless the interests of creditors are affected. In *Ames v. Norman*, 4 Sneed, 683, where the principal case was relied on as authority by counsel in their argument, it was decided that where a husband and wife were jointly seized of an estate, the husband had substantially the same power over it during coverture as over the wife's individual estate; that he could charge it with his debts, or it could be seized and sold on execution against him; but that his assignee, or a purchaser at execution sale against him, would hold subject to the wife's right to take the whole estate if she should survive her husband.

THAT NO CONSIDERATION NEED BE EXPRESSED in a deed under the act of 1715, is a point to which the principal case is cited, as an authority, in *Whitby v. Whitby*, 4 Sneed, 479.

## TURNERY v. WILSON.

[7 YERGER, 340.]

**BOATMAN ON THE MISSISSIPPI RIVER IS LIABLE AS A COMMON CARRIER** for goods which he undertakes for a reward to convey from place to place on the river.

**COMMON CARRIER IS LIABLE FOR ALL LOSSES** not occasioned by the act of God or public enemies, except where he has provided otherwise in his contract.

**EXCEPTION OF "DANGERS OF THE RIVER"** in the contract of a common carrier on the Mississippi exempts him from liability for losses which could not have been prevented by human skill and foresight.

**BURDEN OF PROOF IS ON THE CARRIER** to show that a loss arose from a cause for which he was not liable.

**"DANGERS OF THE RIVER" MEAN**, in such a contract, all hidden obstructions in the river, such as rocks, logs, sawyers, etc., which could not be foreseen or avoided by human prudence.

**EVIDENCE OF A LOCAL CUSTOM** in such a case, that the carrier is to be liable only for losses caused by his negligence or dishonesty, is not admissible to vary his written contract.

**PROOF OF LOSS FROM AN UNKNOWN CAUSE** will not excuse the carrier.

**PROOF THAT THE CONSIGNOR IS THE OWNER** of goods entitles him to maintain an action against a carrier for their loss.

**ACTION** on the case against the owner of a flat-boat on the Mississippi for damage to certain cotton which he undertook to transport from Columbia to New Orleans, and of which the plaintiff was proved to be the owner. The bill of lading, signed by the defendant, showed that the cotton was shipped by the plaintiff in good order, and that the defendant undertook to deliver it in like good order to certain consignees in New Orleans, "the dangers of the river only excepted," they paying the freight. The boat sank on the voyage, and the cotton was much damaged. The defendant offered evidence of a general and well-known custom in Maury county, that flat-boatmen transporting cotton from Columbia to New Orleans were liable only for losses occasioned by their negligence or dishonesty, which evidence was rejected and the defendant excepted. Much evidence was introduced by the defendant to show that the loss was not occasioned by any negligence on his part, that he made every effort to prevent it, and that it arose from a leak produced by some unknown cause. The judge charged the jury, that the plaintiff could not maintain the action unless it was proved that he was the owner, the *prima facie* right being in the consignees; that the defendant was liable, as a common carrier, except for losses coming within the

exemption expressed in his contract; that the legal meaning of "dangers of the river" was "all hidden obstructions in the river, as rocks, logs, sawyers, and the like, which human prudence could not foresee or avoid;" and that the defendant must show that the loss could not be prevented by human foresight or prudence. Verdict and judgment for the plaintiff, and the defendant brought error.

Counsel for the plaintiff in error not named.

*F. B. Fogg*, for the defendant in error.

By Court, GREEN, J. It has so frequently been holden by this court, that "one who undertakes, for a reward, to convey produce, or goods of any sort, from any place upon the river to another, becomes thereby liable as a common carrier," that it is unnecessary to do more here than to refer to the cases: *Craig v. Childress*, Peck, 270 [14 Am. Dec. 751]; *Johnson v. Friar*, 4 Yerg. 48 [26 Am. Dec. 215]; *Gordon and Walker v. Buchanan and Porterfield*, 5 Yerg. 71. Sustaining the character of a common carrier, the boatman is liable to the owner of the goods for all losses not occasioned by the act of God, or the enemies of the country, and the burden of proof is thrown upon him to show that the loss was occasioned in a manner that will exempt him from liability: Peck, 271; 3 Munf. 239. And it is not enough for him to prove that the navigation is attended with such danger, that a loss may happen, notwithstanding the utmost endeavors of the boatman to prevent it. He takes the goods, and engages to carry them, with a knowledge of these dangers, and is supposed to have that in view in fixing the compensation he may demand for the carriage. Indeed, the carrier is regarded as being in the nature of an insurer: *Forward v. Pillard*, 1 T. R. 27. But certain events may be specially provided against in the contract, and then the carrier will not be liable for them: Peck, 271. So in the case before us, the exception of the "dangers of the river" exempts the carrier from liability for those losses which could not have been prevented by human skill and foresight: 5 Yerg. 82. But it was incumbent upon the defendant to prove that the loss in this case did occur from such cause: Peck, 271. All proof on his part was irrelevant, except that which would conduce to show that the loss was occasioned by the act of God, or the enemies of the country, or the "dangers of the river." The legal signification of these terms was correctly stated by the circuit court, and the testimony which was offered to prove the custom of the merchants of

Columbia, was rightfully rejected. Such custom could not affect or in any wise alter the written contract of the parties, as contained in the bill of lading. The language employed in this instrument has a definite legal meaning, which the custom of Columbia could not change. Proof that the loss occurred from an unknown cause, would not excuse the carrier. The loss having happened, he would be chargeable with it, unless he could show by proof, that it was produced by some cause which is within the exceptions made in his favor by the law, or contained in his contract. Plainly, therefore, he could not have been excused by proving that it resulted from an unknown cause.

It was proved that the plaintiff was the owner of the cotton; therefore, the interest of the property being in him, he was entitled to the action: 2 Stark. 331, 332, 333, 338. Let the judgment be affirmed.

Judgment affirmed.

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WHO ARE COMMON CARRIERS.—Whoever undertakes for hire to carry goods from place to place, whether the transportation be from port to port, or beyond sea, at home or abroad, is a common carrier: *McClures v. Hammond*, 1 Am. Dec. 598; *Williams v. Branson*, 4 Id. 562; *Elliott v. Russell*, 6 Id. 306; *Dwight v. Brewster*, 11 Id. 133; *Craig v. Childress*, 14 Id. 751; *Robertson v. Kennedy*, 26 Id. 466. Freighters for hire upon navigable rivers are therefore included: *Williams v. Branson*, 4 Id. 562; *Craig v. Childress*, 14 Id. 751. To the same effect is *Moss v. Bettis*, 4 Heisk. 666, citing *Craig v. Childress* and the principal case.

COMMON CARRIER IS LIABLE FOR EVERY LOSS not occasioned by the act of God or public enemies, or the act or default of the party sending the goods, unless it is otherwise stipulated in the contract: *Colt v. McMechen*, 5 Am. Dec. 200; *Schieffelin v. Harvey*, Id. 206; *Elliott v. Russell*, 6 Id. 306; *Williams v. Grant*, 7 Id. 235; *Craig v. Childress*, 14 Id. 751; *Ewart v. Street*, 23 Id. 131; *Smyrl v. Niolon*, Id. 146; *Jones v. Pitcher*, 24 Id. 716; *Daggett v. Shaw*, 25 Id. 439; *Robertson v. Kennedy*, 26 Id. 466. This is a well-settled principle of law: *Southern Express Co. v. Womack*, 1 Heisk. 267, citing *Turney v. Wilson*. But in Louisiana, by the civil code, a common carrier is liable only for ordinary negligence: *Hunt v. Morris*, 12 Am. Dec. 489. In the case already referred to, of *Southern Express Co. v. Womack*, 1 Heisk. 165, it is said that the question, whether or not a common carrier can limit his liability by notice to the consignor, or by express contract, is one which has been much discussed, and upon which there is a conflict of judicial opinion, and *Turney v. Wilson* is referred to and commented on as an authority on that point. As to whether a common carrier can limit his liability by a notice to the owner of goods, see *Barney v. Prentiss*, 7 Am. Dec. 670, and *Orange County Bank v. Brown*, 24 Id. 129 and note.

LOSS ARISING FROM "ACT OF GOD," what is deemed to be: See *Colt v. McMechen*, 5 Am. Dec. 200; *Williams v. Grant*, 7 Id. 235; *Smyrl v. Niolon*, 23 Id. 146.

"DANGERS OF THE RIVER" and "dangers of the sea" are analogous terms,

and are considered as having the same meaning, when used in the contract of a common carrier: *Jones v. Pitcher*, 24 Am. Dec. 716. They include the natural accidents incident to navigation on river or sea, as the case may be, but not such accidents as might be avoided by the exercise of that prudence and foresight which may be expected of persons engaged in such navigation: *Williams v. Branson*, 4 Id. 562; *Jones v. Pitcher*, 24 Id. 716. See also, *Gordon v. Little* 11 Id. 632, and *Johnson v. Friar*, 26 Id. 215. An exception of dangers of the river in the contract of a common carrier exempts him from liability for losses occasioned by hidden obstructions newly placed in the river, such as human skill and foresight could not discover or avoid: *Gordon v. Buchanan*, 5 Yerg. 71. Loss by fire is not included in "perils of the river:" *Garrison v. Memphis Ins. Co.*, 19 How. U. S. 312. So a loss through the unskillfulness of a pilot is not covered by an exception in the contract exempting the carrier from liability for losses arising from "dangers of the sea:" *Harvey v. Pike*, 7 Id. 698.

BURDEN OF PROOF IS ON THE CARRIER, in case of a loss, to show that it arose from a cause for which he was not liable: *Hunt v. Morris*, 12 Am. Dec. 489; *Ewart v. Street*, 23 Id. 131; *Smyrl v. Nolon*, Id. 146. But where the facts of the loss are such that it may fairly be attributed to inevitable accident, and the owner of the goods alleges unseaworthiness of the vessel as the cause, the *onus probandi* rests upon him: *Bell v. Reed*, 5 Id. 398. With respect to the burden of proof on the question of negligence in a case of the loss of goods intrusted to a warehouseman, see the note to *Schmidt v. Blood*, 24 Id. 150.

USAGE TO CONTROL OR VARY COMMON CARRIER'S LIABILITY.—See on this point the note to *Ostrander v. Brown*, 8 Am. Dec. 217, and *Gordon v. Little*, 11 Id. 632 and note. Where the words in a contract of carriage by common carrier have a definite and unambiguous legal meaning, such as the words "perils of the river," it is held in *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 316, referring to and commenting on *Turney v. Wilson* as an authority on this point, that evidence of a usage or custom is not admissible to explain that meaning. But in *Gordon v. Little*, 11 Am. Dec. 632, evidence of a usage or custom was held admissible to fix the construction of the words "inevitable dangers of the river" in a bill of lading for goods carried on an inland river. As to the admissibility of evidence of a usage generally, where there is a written contract between the parties, see *Eager v. Atlas Ins. Co.*, 25 Am. Dec. 363, and other decisions in this series collected in the note thereto. See also *Pavey v. Burch*, 26 Id. 682.

WHETHER CONSIGNOR OR CONSIGNEE SHALL SUE FOR LOSS, or non-delivery of goods, see *Potter v. Lansing*, 3 Am. Dec. 310 and note, and *Griffith v. Ingledew*, 9 Id. 444. That the consignor is the proper party to sue where he is the owner of the goods, and is, therefore, the one injured by their loss, is held, citing the principal case, in *East Tennessee etc. R. R. v. Nelson*, 1 Coldw. 278, and *W. & A. R. R. Co. v. Kelly*, 1 Head, 159. But the consignor can not maintain an action on the case for the loss or injury of goods without showing a general or special property in them, though he may maintain assumpsit on the contract to deliver the property safely, where he has made the contract and paid or agreed to pay the freight: *Carter v. Graves*, 9 Yerg. 446. In that case Turley, J., thus comments on *Turney v. Wilson*: "The case of *Turney v. Wilson*, 7 Yerg. 346, was an action on the case for the loss of goods shipped, brought by the consignor against the carrier, and the bill of lading showed that the consignees were to pay the freight and that there was no contract with the consignor. The court there were bound by the authorities to



require proof of the ownership of the consignor. We think that the result of all these authorities is, that a consignor can not maintain an action on the case for the loss or injury of the property consigned, without showing that he has a special or general right thereto, for without that he can not claim to have been damnified, but that he may in all cases maintain an action of *assumpsit* upon a contract to deliver the property safely, he having made the same, and paid or become bound for the consideration."

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### SMITH AND FARRAR v. McMANUS.

[7 YERGER, 477.]

**PLEA OF NON ASSUMPSIT BY AN INDORSER NOT SWORN TO** as required by the act of 1819, admits the making and indorsement of the note, and requires only proof of demand and notice to render him liable.

**NOTARY'S PROTEST AND CERTIFICATE THAT HE HAS GIVEN NOTICE** are *prima facie* evidence of demand and notice.

**HOLDER'S INDORSEMENT IN BLANK OF A NOTE DEPOSITED WITH A BANK** for collection, in accordance with a rule of the bank, does not deprive him of his right to sue upon it in his own name if not paid.

**ASSUMPSIT** against Smith and Farrar as indorsers of a certain note under seal, payable at the bank of the United States at Nashville. The defendants pleaded *non assumpsit* and several other pleas. The plea of *non assumpsit* was not sworn to as required by the act of 1819. At the trial it appeared that the plaintiff had deposited the note with the bank for collection, and in accordance with a requirement of the bank in such cases, had indorsed said note in blank. The previous indorsements of Smith and Farrar were also in blank, but were filled up by the plaintiff before suing, so as to show an indorsement from Smith to Farrar and from Farrar to the plaintiff. The plaintiff's indorsement was not stricken out. The protest of the notary, with a copy of the note included in it, and a certificate that he had given due notice of non-payment to the indorsers, were read in evidence, against the defendants' objection. Verdict and judgment for the plaintiff, and the defendants brought the case here by an appeal in the nature of a writ of error. The only questions presented to the supreme court, arising upon exceptions taken at the trial, were: 1. Whether the plaintiff was required by the plea of *non assumpsit* to prove the execution and indorsement of the note. 2. Whether the notary's protest and certificate were competent evidence of demand and notice. 3. Whether the plaintiff, having indorsed the note on placing it in the bank for collection, had thereby deprived himself of the right of suing on it. Other facts appearing at the trial need not be stated.

*Gideon J. Pillow*, for the plaintiffs in error.

*Cobbs*, for the defendant in error.

By Court, CATRON, C. J. The court is again called upon to say what the effect of the plea of *non assumpsit* is in cases where indorsers of a note are sued, and the plea is not sworn to as required by the act of 1819, c. 42.

The act declares, no indorsee of a note or indorsee of a bond shall plead any plea denying, directly or indirectly, such indorsement, unless the plea is accompanied with an affidavit of the truth thereof and subscribed by the party.

In this state we have two descriptions of negotiable notes; one a bill with a single seal, and the other an undertaking in the same form, but without a scroll to it. If the former, before the passage of the act of 1819, was sued upon, the obligor could not plead *non est factum*, but upon oath; every other plea admitted the execution of the instrument. No reason could be imagined, save immemorial usage, why a scroll should give dignity to the paper. When an actual seal was affixed, there was in fact a great difference, as in England, where the seals and armorial bearings of families were generally known and hardly capable of being counterfeited; and this continues to be the case in that country. The legislature of this state, believing that to require proof of the execution of an instrument not having a scroll to it, incumbered the administration of justice without cause where the maker of the instrument would not deny it on oath, dispensed with such proof. But it often happened that although this fact was undisputed, yet that demand had been made of the maker, and notice given to the indorser, was most seriously litigated, and must be put in issue. Then again, in very many cases growing out of the failures of 1819, usury was relied upon as a defense. It soon became a question with the bar how these defenses should be made: as to signing or indorsing a paper, not one in a thousand disputed that, but to be driven to a special plea that demand was not made, or that notice was not given, or that usury had been taken, and how much, was most inconvenient, and in case usury was the matter of defense, and very often it was, to prove the plea precisely to meet the proof was next to impossible. The consequence was, the old defense and general issue of *non assumpsit* was adhered to. The plea was filed not on oath, and on the trial the courts ruled, and most correctly, that the plea did not apply to a denial of the making of the note or its in-

dorsement; that these were admitted, but that the other defenses could be made under the plea. If the suit was upon the note against the maker, no proof was required on part of the plaintiff; if the plea of *non assumpsit* was filed, the defendant was holden to admit the *prima facie* cause of action, as if payment had been pleaded to an action of debt upon a bill single; and so when an indorser was sued, no proof was required but demand and notice to fix him. The existence of the paper, as described in the declaration, was admitted by the plea, and to establish the demand and notice, it furnished no evidence if produced, and therefore its production became unnecessary upon the trial.

The same legislature (1819, c. 48) declared that the protestation of notaries public should be evidence. This, however, not being sufficiently explicit, at the next session (1820, c. 25, sec. 4) it was enacted that the protest of the notary of non-acceptance or non-payment of negotiable paper, and his certificate that he had given notice to the indorsers, should be *prima facie* evidence of the fact of notice, as well as of demand. The note was copied out in the protest and given in that form in evidence in this cause; and which protest was sufficient evidence of demand and notice. It was precise in its character, and the production of the original note could not have been of the least aid to the jury.

The second objection is, that the note had two indorsements, and that the plaintiff also put his name on the paper when he deposited it in the United States bank where it was payable. The indorsements were all in blank up to the trial when the two first were filled up, the second of course to the plaintiff. It is insisted the third indorsement vested the title of the note in the bank. Mr. Chaffin proves the rule of the bank is to require of those who deposit notes there for collection to indorse their names on them, and for the very plain reason that if the note is paid the bank must know who is the owner, as she is not. To the last indorser the bank pays the money, and to him if the payment is not made, the note is returned. Had the bank discounted the paper and the last indorser been compelled to take it up, an occurrence of every day, no necessity rested on him to prove the want of integrity and failure to pay of the maker and previous indorsers; his having possession of the paper would be sufficient to authorize him to fill up any previous indorsement to himself on the trial of the cause and strike out subsequent or intermediate ones: Chit. on Bills, 370.

The plaintiffs' right to sue was clear both upon the fact that the bank have had title, and upon the law grounded on the *prima facie* evidence of title, that the possession confers on the holder of negotiable paper indorsed in blank or payable to bearer. These being the only objections to the proceedings below, the judgment must be affirmed.

Judgment affirmed.

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NOTARY'S PROTEST AND CERTIFICATE ARE EVIDENCE OF NOTICE to an indorser: *Browne v. Philadelphia Bank*, 9 Am. Dec. 463. So, though the notice was given by an employee: *Stewart v. Allison*, Id. 433. But in *Williamson v. Turner*, 1 Id. 652, it is held that the notary's protest must be based on his own information. The oath of a notary is insufficient evidence of notice if his recollection of the facts is vague and uncertain: *Hoff v. Baldwin*, 13 Id. 385. As to the admissibility of entries in a deceased notary's books as evidence of demand and notice, see *Halliday v. Martinet*, 11 Id. 262; *Bell v. Perkins*, 14 Id. 745. As to the admissibility of the testimony of a clerk of a deceased notary, as evidence on this point after examining the notarial record, see *Sharpe v. Bingley*, 12 Id. 643.

HOLDER'S RIGHT TO FILL OR STRIKE OUT INDORSEMENTS.—See, on this subject, *Morris v. Foreman*, 1 Am. Dec. 235; *Gorgerat v. McCarty*, Id. 270; *Ritchie v. Moore*, 7 Id. 688 and note; *Hill v. Martin*, 13 Id. 372; *Hunter v. Hempstead*, Id. 468 and note.

HOLDER UNDER A BLANK INDORSEMENT IS PRESUMED the owner, and is vested with the right of action on a negotiable instrument: *Abat v. Rion*, 13 Am. Dec. 313; *Bolton v. Harrod*, Id. 306; *Rees v. Conococheague*, 16 Id. 755.

PLEA OF THE GENERAL ISSUE NOT SWORN TO in an action on a negotiable instrument admits the making and indorsement of such instrument, where there is a rule of court requiring a plea denying the execution or indorsement of such an instrument to be sworn to: *Thomas v. Clark*, 2 McLean, 194, citing the principal case.

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## SWAN'S LESSEE v. PARKER.

[7 YERGER, 490.]

DESCRIPTION OF LAND IN A RETURN OF A LEVY OF EXECUTION, is sufficiently certain, where it states the levy to have been made on the right, title, etc., of the judgment debtor, "in and to seventy acres of land lying on the west fork of Stone's river," since it may be made certain.

PAROL EVIDENCE TO SHOW THAT THE LAND SOLD under the execution, in such a case, was the only land owned by the debtor in the locality specified in the return, is admissible.

LOCALITY AND BOUNDARY ARE QUESTIONS FOR THE JURY in an action of ejectment brought by the purchaser in such a case.

EJECTMENT for certain land claimed by the plaintiff's lessor, as purchaser at a sale on execution from the county court of

Rutherford county against one John Doak. The defendants claimed under a conveyance from John Doak. The main question was as to the sufficiency of the description of the land in the constable's return of the levy of the execution under which the plaintiff's lessor purchased. That description is given in the opinion. The plaintiff offered to prove, by certain witnesses, that the land levied upon, and sold upon *venditioni exponas*, under the order of condemnation made upon the return of this execution, was the only land belonging to John Doak, in Rutherford county, but the evidence was rejected, and the plaintiff excepted. The court below charged the jury, among other things, that the levy upon which the condemnation was founded, was void for uncertainty, and the plaintiff again excepted. Verdict for the defendants; motion for a new trial overruled, and an appeal by the plaintiff in the nature of a writ of error.

*S. D. Rowan and A. J. Hoover*, for the plaintiff in error.

*C. Ready and J. Rucks*, for the defendants in error.

By Court, PECK, J. There are many points made in the cause, though perhaps it may not be necessary to notice any of them, except that on the charge of the circuit court declaring the constable's levy void for vagueness and uncertainty.

It is insisted the description of the land, as the same is designated in the levy, is insufficient: "Levied on the right, title, claim, and interest that John Doak has in and to seventy acres of land lying on the waters of the west fork of Stone's river; no personal property to be found. May 12, 1830." The description necessary to be given of the land levied on, has not frequently been directly made a question in our courts; it might be difficult to lay down a general rule by which officers could be directed in making them, or the courts be governed in deciding upon them when made; in the case before us, there is the quantity of land, the name of the owner, and the water course whereon the same is situated.

There may not be certainty to every intent, nor is it necessary there should be in such a case; certainty to a general intent, such as would put the owner and purchasers upon inquiry, affording the means of complete information, is all that can be expected. But the levy of itself should not be laid hold of, because it is supposed not to point minutely to the estate set apart for the satisfaction of the debt. The advertisement should, and we may reasonably suppose has, with greater identity, fixed the

locality. The officer is supposed to have done his duty, and the maxim, *id certum est quod certum reddi potest*, has application. The deed, we know, usually follows, and amplifies the description in the advertisement; none of these should be inconsistent with the levy. If a case was presented where the description was inconsistent with the levy, where there was a want of fitness, there, indeed, the court would look to the discrepancy with vigilance, to see that a fraud through such a guise should not be let in. This is not such a case.

The plaintiff had a right to his evidence; locality and boundary are questions for the jury. We can not know but in the proof, particularly the advertisement which may be produced, but that the plaintiff would have made that certain, which, from the return, might have appeared doubtful; still this is proof which might have been rebutted. On this point alone, we are of opinion the judgment must be reversed.

There is another point in the cause which may seriously affect the plaintiff's right under his execution, and that point is, to what time shall the lien relate; shall it relate to the levy, or shall it relate to the condemnation upon the return into court?

This question, so far as I am informed, is new; and as it has not been debated, we will not give a hasty opinion upon it.

Judgment reversed.

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**CERTAINTY OF DESCRIPTION IN SHERIFF'S LEVY, RETURN, OR DEED.**—The foregoing case came again before the court in *Parker v. Swan*, 1 Humph. 80, and the description in the levy was again declared to be sufficiently certain. Green, J., said: "The title does not rest upon the description in the levy, but the deed follows and defines its locality with precision. All that is necessary in the levy is some general description that will, by reasonable intendment, connect it with the sale and deed, so that a tract of land different from the one levied on may not be sold and conveyed. This, we think, is given in the levy before us." Technical accuracy in the description of the property in a return on execution is not required, but it must be sufficient to enable the property to be identified: *Duwall v. Waters*, 18 Am. Dec. 350. A general description in the schedule and advertisement of a sale on execution is sufficient: *Berry v. Griffith*, Id. 309. A sheriff's deed describing the property as "all that plantation or tract of land lying in Sumter district" is invalid for uncertainty, and can not be aided by parol or by the advertisement: *Broughton v. Birchmore*, Id. 654.

**CERTAINTY IN DESCRIPTION IN CONTRACT FOR SALE OF LAND.**—See, on this point, the note to *Atwood v. Cobb*, 26 Am. Dec. 665.

## DUNCAN v. MARTIN.

[7 YERGER, 519.]

BEQUEST OF PERSONALTY TO A WOMAN AND THE "HEIRS OF HER BODY lawfully begotten" vests the entire interest in the first taker.

BILL in equity to determine the right of the complainants as heirs of the body of Mrs. A. Perkins, deceased, to certain slaves. The slaves in question were bequeathed to Mrs. Perkins by her father. The language of the bequest is stated in the opinion. The defendants demurred specially on the ground that Mrs. Perkins took the absolute interest in the said slaves, and that they belonged to her husband, who survived her, and under whom the defendants claimed. Bill dismissed and the complainants appealed.

*John J. While*, for the complainants.

*J. S. Yerger*, for the defendants.

By Court, GREEN, J. The bequest in this will to "A. Perkins to her and the heirs of her body lawfully begotten," if applied to realty, would create an entail. The rule of law is, that whenever the words of a bequest, if applied to realty, would create an entail, when applied to personalty vests the absolute interest in the first taker. The words in this will being applied to personalty, vested the entire interest in Mrs. Perkins. The decree of the court below must therefore be affirmed.

Decree affirmed.

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ABSOLUTE ESTATE IN PERSONALTY IS GIVEN BY A BEQUEST to one for life and "to her children forever:" *Shearman v. Angel*, 23 Am. Dec. 166. In *Clark v. Clark*, 2 Head, 338, the principal case was recognized as an authority for the position that where the words of a will, if applied to realty, would create an estate tail, they will, when applied to personalty, vest the absolute property in the first taker; but the rule was held not to apply to a bequest of slaves to the testator's daughter, a *feme-sole*, subject to the provision that "the said negroes, with their increase, shall be entailed on my said daughter Martha J. and her children, and not to be taken for the debts of her husband," the court being of the opinion that the use of the word "entailed" could not be supposed intended to create an estate tail in the technical sense, but to settle the property on the daughter for life, free from the control of her husband, with remainder to her children, if she should have any, and a decree was made in accordance with this construction. The correctness of the general principle laid down in *Duncan v. Martin* was conceded also in *Loving v. Hunter*, 8 Yerg. 30, but was held inapplicable where the words of the will under consideration were: "The remaining two thirds of my estate I lend unto my three daughters, etc. [naming them], to them during their natural lives, and then given to the lawfully begotten heirs of their bodies;" and it was decided that by this provision an estate for life only was given to the daughters, with remainder over to their children.

## BATTLE v. BERING.

[7 YERGER, 529.]

DECREE FOR MONEY UNDER THE ACT OF 1787, c. 22, sec. 2, has the same force as a judgment at law.

STATUTE OF FRAUDS OF 29 CAR. II., relating to the lien of executions on personalty, is not in force in Tennessee.

GOODS OF A DEBTOR ARE BOUND BY A DECREE AWARDED EXECUTION, from the rendition thereof, as against a subsequent purchaser from the debtor before the execution is actually issued.

BILL for an injunction against the sale of a certain slave on an execution in favor of Battle, the defendant, against one Clark. The execution was issued on a decree for money recovered in the Franklin chancery court, November 15, 1831, which awarded execution in the usual form. Said execution was issued in January 1832, tested of November term, and was levied on the slave in question. The complainant, Bering, purchased said slave of Clark in December, 1831. The court below made the injunction prayed for perpetual, and the defendant, Battle, appealed.

*J. S. Yerger and F. B. Fogg*, for the appellant.

*R. C. Foster, jun., D. Craighead and Laughlin*, for the appellee.

By Court, CATRON, C. J. First, as to the effect of the decree. By the act of 1787, c. 22, sec. 2, it is enacted, "that in all cases where decrees may have been made in any suit in equity in any of the courts of this state, or shall hereafter be made for any sum or sums of money, it shall, and may be lawful for execution to issue thereon against the defendant's body, or against his goods and chattels, lands and tenements, to satisfy such decree (and lands and tenements, goods and chattels, shall be bound by such decree and execution in the same manner as lands and tenements, goods and chattels, are by judgments in law), and costs, in the same manner as executions may or shall issue in the courts of law."

The decree of Battle against Clark, therefore, had the force of a judgment at law. Does a judgment at law overreach an alienation made by the execution debtor after the judgment rendered, and before the execution comes to the sheriff's hands?

The relation of executions has so often been before this court, that we will not repeat what has been heretofore said on the subject. That the statute of frauds, 29 Car. II., is not in force here, nor was it ever in North Carolina, has been declared in



almost every case treating on liens and executions for forty years. We, therefore, must be governed by the common law. in the case before us; and by the common law, the goods of the debtor are bound from the time the execution is awarded; but the difficulty with us has been, when this was done. This court, in *Johnson v. Ball*, 1 Yerg. 292 [24 Am. Dec. 451], held, that to award was to adjudge, to give anything by judicial sentence; that our judgments in terms award execution; and that to this date at least, the execution tested as of the term at which the judgment was rendered relates, by the English and American authorities. In *Preston v. Surgoine*, Peck, 80, the same rule is recognized. The court declare that the execution bound the debtor's property from its test; and if he died after the judgment rendered, but before the execution came to the sheriff's hands, yet no proof could be heard or inquiry made as to this fact, if the execution was tested before the death, and the judgment was before.

In the 31 Elizabeth (Cro. Eliz. 174), it was holden that if a *fi. fa.* be directed to make execution of goods, and after the test of the writ, and before the sheriff executes it, the party sells the goods *bona fide*, they can be taken in execution; for by the award, the goods are bound, so that they may be taken in execution in whose hands soever they come. Cro. Eliz. 440, 2 Bac. Abr. 733, and 10 Vin. Abr. 566, are to the same effect. Suppose a sale had been made by the sheriff, by virtue of Battle's judgment, and Bering had sued the purchaser in detinue for the slave. The purchaser would have relied upon the decree, which ordered execution to issue, and on the *fi. fa.* issued in pursuance of the decree, and bearing even date with it and the purchaser's title, by relation, must have been holden to have vested when the execution creditor's right to satisfaction vested, which was when execution was awarded him by the decree: 2 Hayw. 245.

Since the decision of this court in *Preston v. Surgoine*, in 1823 (Peck, 80), no discretion is left to the court; we dare not hold that no lien is fixed until the execution is actually taken out of the clerk's office. The judgment was had against Surgoine in May; on the fourteenth of August he died; and on the sixteenth, Preston took out his execution. The cause was argued and advised upon. Judge White delivered an opinion, that the *fi. fa.* did not bind the goods of Surgoine, and could not be executed by the sheriff disregarding the death, and that the execution should be quashed. But the other three judges held, that in case of personals, if a *fi. fa.* issue after the death

of defendant, tested as of the term preceding his death, it binds the goods, and they are in *custodia legis*, not in the hands of the executor. Haywood, Peck, and Brown concurring. And this is in accordance with the opinion of Judge Haywood, as expressed in 1795, in *Winstead v. Winstead*, 1 Hayw. 246. The decision pursues the common law authorities: 10 Vin. Ex., A, a, 566; 2 Ld. Raym. 849; and the opinion of the majority of the court determines that the common law is unaltered by our statute, requiring clerks and sheriffs to indorse on process the time of its issuance by the clerk, and delivery to the sheriff.

That the statute of Charles II., declaring no execution should form a lien on personals so as to defeat *bona fide* purchasers, etc., is the safer rule, we think true; but the legislature has not so declared, and it is the duty of this court to administer the law as it is found to exist. The decree of the circuit court must, therefore, be reversed, and the bill dismissed.

Decree reversed.

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EXECUTION BINDS PERSONALTY FROM WHAT TIME.—See *Beals v. Guernsey*, 5 Am. Dec. 348; *Haggerty v. Wilber*, 8 Id. 321; *Cresson v. Stout*, 373; *Beals v. Allen*, 9 Id. 221; *Green v. Johnson*, 11 Id. 763 and note; *Jones v. Jones*, 18 Id. 327; *Palmer v. Clarke*, 21 Id. 340; *Johnson v. Ball*, 24 Id. 451 and note; *Collingsworth v. Horn*, Id. 753; *Million v. Riley*, 25 Id. 149 and note; *Hickman v. Caldwell*, 27 Id. 274 and note. That an execution in Tennessee binds from its *teste*, and that the statute of 29 Car. II., sec. 3, is not in force in that state, see *Johnson v. Ball*, 24 Id. 451. So held, also, in *Daley v. Perry*, 9 Yerg. 443, and *Peck v. Robinson*, 3 Head. 439, citing the principal case. It is cited, also, on the same point, in *Black, Adm'r, v. Planters' Bank*, 4 Humph. 368, and *Neil v. Gaut*, 1 Coldw. 397, where it is held that a *fi. fa.*, tested before the defendant's death, but issued afterwards, binds the decedent's goods. The case is also referred to as an authority in *Stewart v. Nuckols*, 15 Ala. 231.

TERMS JUDGMENT AND DECREE ARE DECLARED INTERCHANGEABLE by sec. 2970 of the Tennessee code.

## FRIERSON v. VAN BUREN.

[7 YERGER, 606.]

CONSTRUCTION OF WILL.—Where a testator devises all his property to his wife during life or widowhood, and then provides as follows: "My wife are to have an equal portion of the property with the children: if she marries, there is to be an equal division with her and my children of the whole property: there is to be a division each time that either of my children arrives at the age of twenty-one years, with them and my wife; if she marries, she is not to share with the children in their separate division; should either of them lose their breath entirely, she is not to

share with my children neither;" the wife, if she continues sole, is to share equally with the children, and as each becomes of age or marries, there is to be a division, such one taking his portion absolutely, the residue remaining in common until another like event, until at last the wife and the last remaining unmarried or infant child share equally in the residue. If the wife marries, there is then to be an equal division between her and the children, she taking her portion, leaving the residue in common among the children, to be divided as each becomes of age or marries, such one then taking his portion absolutely, and if any one of the children die before marriage or coming of age, his portion is to vest in the surviving children, the wife taking no share therein.

**BEQUEST IS OF THE ESTATE AS AN AGGREGATE FUND** to the children as a class in such a case, they taking as tenants in common, and if one dies before twenty-one or marriage, the estate survives to the others.

**HEIRS OF A CHILD DYING UNDER AGE, AND UNMARRIED**, other than the surviving children of the testator, are entitled to no part of the estate so devised.

**BILL** filed by the only surviving child of James Pain, deceased, together with her husband, to determine her rights under her father's will. The will devised to the wife of the testator all of his property during her life or widowhood, she to pay his debts and clothe and educate his children. It then provided: "My wife are to have an equal portion of the property with the children: if she marries," etc. The remaining clauses, so far as material, are stated in the opinion. The testator left surviving him his wife and three children. His widow married the defendant, Van Buren, a few years afterwards. One fourth of the estate was allotted to her, leaving the rest undivided. Two of the children afterwards died under age and unmarried. Several children were born to the testator's widow after her marriage with Van Buren, and before the death of the two children of the testator before mentioned. These children of Van Buren and wife now claim an equal share with the surviving child of the testator in the portions of the two deceased children, and the chancellor decreed accordingly. The complainants appealed.

*F. B. Fogg*, for the complainants.

*George S. Yerger and Gideon J. Pillow*, for the defendants.

By Court, **GREEN J.** Although, from the inartificial manner in which this will is drawn, it seems at the first view to be difficult to comprehend the meaning of the testator; yet, upon a close examination of this instrument, the difficulty disappears. The testator, contemplating the possibility of the marriage of his wife, has made a disposition of his property as applicable

to the state of things which may exist, either upon her continuing sole, or upon the event of her marriage. If she continue sole, she is to share equally with the children, and as any one of them may become of age, or marry, there is to be a division, and such one is to take its portion, which then vests absolutely in the child so becoming of age or marrying; the residue remaining in common, until another like event, when the same process is to take place, until at last, the mother and the remaining unmarried or infant child are to share equally in the residue. But if she marries, there is to be an equal division with the children, and she is to take her share out of the common stock, leaving the portion belonging to the children still undivided. As any one of the children may become of age, or marry, a division is to take place among them, and the portion of such one is to be separated from the common stock, and held as his or her absolute property. And if any one of the children should die before becoming of age, or marrying, the portion of such one is to vest in the survivors, the mother having no share of such portion.

The language of the will is, "if she marries, there is to be an equal division with her and my children of the whole property: there is to be a division each time that either of my children arrives at the age of twenty-one years, or marries, with them and my wife; if she marries, she is not to share with the children in their separate division; should either of them lose their breath entirely, she is not to share with my children, neither." The only possible sense of this last clause is, that as the wife is not to share with the children, if one of them die, as a consequence, the surviving children are to take the estate. To say that she shall not share with them, is, in effect, to say that they shall be exclusively entitled. Taking it for granted, that this is the plain sense of the will, it is a limitation of the estate to the survivors, upon the death of any one of them, before arriving at full age or marrying. Although it is not expressly said, that the limitation is confined to a dying before marriage, or arrival at full age, yet, that is the plain meaning of the testator; because the estate is to vest in severalty on the happening of either of those events, and becomes absolutely the property of the holder; and because, in the clause under consideration, the testator speaks of the "separate divisions of the children," as before stipulated, and in connection with this, speaks of the death of any one of them, and says, that "in such case, she is not to share with my children, neither." Here, then, he can only

mean a death, happening before the time at which it is prescribed in the will, that these separate divisions shall take place. It may also be observed, that this estate was an aggregate fund, and was bequeathed by the testator to his children as a class, and they took as tenants in common. In such case, if one die before the period when the division was to take place, that is, twenty-one, or marriage, the estate survives to the others: 3 Atk. 80; 1 Turn. & R. 413, 415. The testator here clearly intended that the estate should be kept in one aggregate mass, until the happening of some of the events upon which portions of it were to be taken out, leaving the balance still unbroken. It was the share of any one of his children, who might die before twenty-one or marriage, in this unbroken mass, that he intended to limit to the survivors. The language clearly shows that he intended his estate should go by virtue of the will, and not be distributed under the statute. The very exclusion of the wife, who, by law, would have been entitled, is proof of this; and when we add to this the plain inference from the language of the will, that in the event of the death of one, "she is not to share with my children," it is put beyond doubt, and fixes the limitation to those children with whom she was not to share. It would be a strange construction to say, that he intended to exclude her if she married, and yet that he designed to let in the issue of such marriage.

If this be the meaning of the will, the next inquiry is, whether there is any rule of law which will prevent the intention of the testator from taking effect. There surely is none. The children had no power to dispose of their estates within the time limited for the death to happen. It must occur, at the farthest, in less than twenty years. Then, as the testator had the power to give his estate to his children, to be divested upon the happening of a particular event, which must occur in less than twenty years, and having, as we think, made the limitation in this case, we are of opinion that his intention ought to be carried into effect, and that the decree be reversed, and a decree for complainants.

Decree reversed.

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WHERE AN AGGREGATE FUND IS BEQUEATHED to the testator's children as a class, and one dies before the period of division, the estate survives to, and vests in the others; otherwise where the bequest is to individuals *nomi- natim*: *Satterfield v. Mayes*, 11 Humph. 60, citing the principal case. It is cited to the same point in *Bridgewater v. Gordon*, 2 Sneed, 9, where, however, the principle is held to apply only "in the case of an aggregate fund given to a class of persons as an unit, and who take a joint interest in the fund."

CASES  
IN THE  
SUPREME COURT  
OF  
VERMONT.

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BRAINARD *v.* STILPHIN, JUN.

[6 VERMONT, 9.]

JUNIOR IS NOT PART OF A PERSON'S NAME in law.

WHERE AN EXECUTION FOR THE COLLECTION OF A MILITARY FINE recites that it was imposed by C. S., captain, and was signed C. S., jun., captain, it will be a justification to the person acting under it.

TRESPASS for the value of cloth. The defendant justified under an execution issued on an amercement of Brainard for delinquency of military duty. The execution was signed Cornelius Stilphin, jun., but recited that the fine was inflicted by Cornelius Stilphin, captain. The execution was therefore excluded on the trial, whence the defendants excepted.

*Stephens, Smith, and Royce*, for the defendant.

The names of counsel for the plaintiff are not stated.

By Court, MATROCKS, J. The question which is raised in this case, is whether there is such a fatal repugnancy in the extent or execution under which the defendants justify, as to make the captain, who issued the same, and the orderly sergeant, who executed it, trespassers. And the objection is, that the warrant recites that the fine was inflicted by Cornelius Stilphin, captain, and is signed by Cornelius Stilphin, jun., captain. If these names must be considered as meaning two persons, then the process is bad. But if they may be considered the same person by any legal intendment, then it is well. Questions of misnomer have generally arisen upon pleas of abate-

ment, and our ancient sages were nearly as nice upon names, as the fathers were upon the question whether a baptism in bad Latin could be canonical. In *Crane v. King*,<sup>1</sup> 1 Willes, 554, the plaintiff declared against Henry King, otherwise Henry Vaughan King; and the declaration was adjudged bad, because the defendant could not have two Christian names at the same time. In *Holman v. Walden*, 1 Salk. 6, defendant pleaded in abatement that he was baptized by the name of John, and was not called or known by the name or surname of Benjamin Walden. Plaintiff replied he was called and known by the name and surname of Benjamin Walden. To this defendant demurred, and at first the court inclined against the replication, on the ground that the only material part of the plea was the name of baptism, and that he could have no other. But at last it was decided the other way—Holt, C. J., saying that “one may have a nomen and a cognomen, that never was baptized, as thousands in fact have;” and in *Bowen v. Shapcott*, 1 East, 542, and in *Sabine v. Johnstone*, 1 Bos. & Pul. 60, it was decided that if the defendant was known by one name as well as another, he might be sued by either. In *Franklin v. Talmadge*, 5 Johns. 84, it was decided that a writ should not abate for omitting the middle name, on the old ground that a person has no right to have two Christian names.

In *Lepra v. Brown*,<sup>2</sup> 1 Salk. 7, defendant was declared against as A. B. of D. in the custody of the marshal. The defendant pleaded in abatement that his father lived in D. likewise, and that his name was A. B., and that he, the defendant, ought to have been called junior in the bill. The court said, any other appellation to distinguish father and son was as good as senior or junior; and the son's being in custody of the marshal, was a sufficient distinction. They also said, if father and son had lived in different counties, and the process had been an original one, there had been no need of such addition; and in pursuance of this, the courts in New York and Massachusetts have decided that junior is not in law any part of a person's name. Indeed, how can it be? Not by baptism. No male is thus baptized; and females, it is believed, never have that appellation.

The son, when he comes to correspond, or do business, assumes this addition to his name, if his residence is near his father's, to prevent mistakes by confounding names and persons: and this, as the residence of either party shifts, he drops and assumes at pleasure, not asking leave of the legislature,

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1. *Evans v. King*.2. *Lepiot v. Brown*.

as is done when it is proposed to exchange an uncouth name for one that is more sonorous. Junior, then, being but an addition of designation, which it is sometimes proper to use and sometimes useless, like second and third, which are also often used, and as the propriety of its use depends on time and place, if the captain was C. Stilphin, jun., as he has signed himself—if on the twenty-eighth day of June, when the plaintiff was amerced, his father lived out of the county, according to 7 Salk., or out of town, according to the practice of some, or out of the state or the United States, then the captain might have properly called himself Cornelius Stilphin: and if before the fifteenth of July, 1830, when the execution was dated and signed, the father had come into the same town or county to dwell, then it would have been consistent to sign himself Cornelius Stilphin, jun., captain. If such was the fact, the proceedings would be punctiliously correct. And to meet a technical objection founded on a clerical error in fact, any intendment short of absolute absurdity should be made. But upon more enlarged principles, as junior is no part of the name, why may it not be expunged or treated as surplusage, as if it had been “of St. Albans, or Roanoke?”—and then the two supposed captains will be a unit, and this junior will no longer perplex his seniors by causing them to demur upon this knotty case.

The constitutionality of the militia law has been presented in the plaintiff's brief in this court: but as that question was not stated below, and this law has been so long acquiesced in, we have not thought it necessary to go into that point.

Upon the whole, we think there is no such irregularity in this extent as would render it void, or not a justification to the justice and sheriff, if it had been an execution. And it would be the height of injustice to hold military officers, whose main duties are not of a clerical cast, to a greater strictness in such matters than would be required of the judiciary, whose duty it is especially to know and to follow the forms of law.

The judgment of the county court is reversed.

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JUNIOR.—Where a father and son have the same name, it will be presumed that the father is meant where the name is used without explanation: *Brown v. Benight*, 23 Am. Dec. 373. But “junior” is no part of a man's name; and which one of two persons bearing the same name is meant, the word “junior” or “senior” not appearing, is a question of fact: *Johnson v. Ellison*, 16 Id. 163.



## TOWN OF BURLINGTON v. FOSBY.

[6 VERMONT, 68.]

AN ILLEGITIMATE CHILD CAN INHERIT from another illegitimate child of the same mother.

APPEAL from the decree of the probate court. The town of Burlington claimed the property in question by escheat from Thomas Jackson, deceased, a bastard, and Rhoda Fosby claimed the estate as heir, she being also an illegitimate child of Jackson's mother.

*Lyman and Marsh*, for the defendant.

*Maecck*, *contra*.

By Court, MATTOCKS, J. The only question presented in this case is, whether "one illegitimate child can inherit to another illegitimate child of the same mother."

The seventy-seventh section of the probate act declares, that "bastards shall also be capable of inheriting and transmitting inheritance on the part of the mother, as if legally begotten of such mother." What language could be more intelligible? What can it mean, unless it be that among mothers and children of this description, property shall be inherited—that is, attainable by succession, and transmissible by inheritance? This is an innovation upon the common law, and there are many such in our law relating to the descent and distribution of estates. One in this very section, making the common law give place to the civil, in case the parents of illegitimate children afterwards intermarry.

By the seventy-fifth section of the same act, it is enacted, "that if no father survive the intestate, his or her brothers, sisters, and mother, and their legal representatives, shall be entitled to the whole of such intestate's estate." This case, on paper, does not find that the mother is dead; but it was so stated at bar, and the briefs and arguments have gone on that ground: therefore, so we consider it. This fact, however, would not alter the principle of the decision; but only give Rhoda, the child, the whole in lieu of half of the estate. Now, when Thomas died, if he was "capable of transmitting inheritance on the part of his mother," why did not the estate pass to Rhoda, the sister, if the mother was not living, and if living, half to the mother and half to the sister? Who is a child's mother, can be rendered certain to a certain intent; and so also that the same woman is the mother of both children; and so are such

children always called and known as the children of such a woman: And, with the proviso in the same act, before quoted, could the legislature, in the seventy-fifth section, mean to exclude this description of persons, and confine the descent to the legitimate "brothers, sisters, and mothers," thereby in effect repealing much of the beneficent and remedial provision of the seventy-seventh section, made evidently to ameliorate the condition of these unhappy persons, and thereby take the bread from the innocent surviving children, and give it to their unnatural father, the public? We think not. But it has been argued that this antenuptial group can not be considered as brother, sister, and mother, within the meaning of the statute. Why not? If the brother and sister are both related to the same mother, they must be related to each other. There has been no adjudged case cited to show that the ordinary relationship does not exist between this female parent and her offspring. One case is indeed recollected, which, if it were good law at this day, might have some bearing. It was the *Duke of Suffolk's case*, in the reign of Edward VI., to be found in Brook Abr., tit. Administrator, No. 47, and that case may be considered as nearly overruled by the infinite ridicule bestowed upon it by Lawrence Stern:

"Charles, duke of Suffolk, having issue a son by one venter, and a daughter by another venter, made his last will, wherein he devised goods to his son, and died. After his death the son died also, but without will, without wife, and without child; his mother, and his sister by the father's side (for he was born of the former venter), then living. The mother took administration of her son's goods according to the statute of 21 Henry VIII., which directs administration to be given to the next of kin. The sister, by the father's side, contested this administration—contending: 1. That she herself was next of kin; and 2. That the mother was not of kin at all to the party deceased, and gained her cause on both points. The temporal lawyers—the church lawyers—*juris consulti*—*juris prudentis*—the advocates—the judges of the consistory and prerogative courts of Canterbury and York, and with the master of the families, were all unanimously of the opinion that the mother was not of kin to the child—*mater non numeratur inter consanguineos*. If this last point in that learned case was good law, which the vulgar commentator has said is always doubted, yet in the same case it was resolved that a sister was of kin to her brother."

It has been urged that at most Rhoda was a sister of the half-

blood to Thomas. It has been decided in *Brown v. Brown*, 1 Chip. 362, that the half-blood under our laws inherit equally with the whole-blood, both real and personal property, the same as they do personal property in England, under the statute of distribution, the feudal doctrine which excludes the half-blood from taking lands by descent, never having been adopted here. Besides as bastards are children of no father, it would seem difficult to show that these are children of different fathers. It has also been said, that the word "inheriting" in the seventy-seventh section, can only apply to lands—such being the common law definition. But by the seventy-eighth section of the statute before mentioned, it is enacted that the personal estate of those who die intestate, shall be distributed in the same manner in which real estate descends by said act. This removes the objection.

Finally, it has been said that the statute could never intend to give such great privileges to these illegal children, as it would encourage libertinism and illicit intercourse between the sexes. As to the policy of the law, it is for those who make, and not for those who administer it, to judge; and when the provisions are not doubtful, there is no discretion in the court. Whether it be the most wise and humane to punish this sort of children for the impurities of their parents, is not our province to decide. But there is nothing very new or alarming in this statute. By the laws of Justinian, bastards were allowed conditionally to inherit to their mothers; and in most of the nations of Europe, with the exception of inheriting and transmitting to their illegitimate relations, they are placed on the footing of other subjects; and we refuse them the right to inherit any part of their father's estate, which some of the ancient nations allowed them, and only permit them in all respects to be the children of their own mothers.

The judgment of the court is, that the said Rhoda Fosby is the heir at law of Thomas Jackson, the intestate, and is entitled to the personal estate of which he died possessed.

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ILLEGITIMATE CHILDREN.—Under a devise to the testator's mother and her children, an illegitimate sister of the testator can not take: *Shearman v. Angel*, 23 Am. Dec. 166. By the common law, an illegitimate child could not inherit his father's estate: *Sneed v. Ewing*, 22 Id. 41. In respect to a bastard's mother inheriting his estate, see *Cooley v. Dewey*, 16 Id. 326.

## WRIGHT v. GEER.

[6 VERMONT, 151.]

ON A DECLARATION SETTING FORTH A JOINT UNDERTAKING to construct a mill, and the negligent and unskillful conduct of the defendant, whereby plaintiff was greatly damnified, the plaintiff must prove the joint contract, to enable him to recover.

WHERE AN EXPRESS CONTRACT IS NECESSARY TO CREATE A LIABILITY, it must be stated, and must be proved as laid.

IF THE DEFENDANT'S TORTIOUS DISREGARD OF A DUTY is the ground of his liability, it would seem not to vary the ground, though a similar duty rested upon another.

CASE against defendants jointly, alleging that they were partners, and as such, undertook to erect a trip-hammer water-mill for the plaintiff, but so negligently and unskillfully erected the mill as to make it of no use to the plaintiff, whereby he was greatly damnified and injured. On the trial, the plaintiff insisted that the defendants were partners. They maintained the converse, and contended that if such were the fact, a joint contract must be proved, in order to warrant a verdict for the plaintiff against either defendant. The court charged, that the jury might find against either or both of the defendants, as the evidence seemed to justify. Verdict in favor of one of the defendants, and against the other, who thereupon excepted.

*Maeck*, for the defendants.

*Briggs and Sawyer*, *contra*.

By Court, PHELPS, J. The only question in this case is, whether the plaintiff, having obtained a verdict against one of the defendants only, is entitled to judgment on the verdict. On the one hand, it is urged that the action being founded on a tort, it is competent for the plaintiff to take judgment against such of the defendants as are proved guilty, although all may not be convicted. On the other hand, it is insisted that the action is founded on a breach of contract alone, and falls within the common rule as to contracts, that a recovery must be had against all the defendants, or neither. Various cases have been cited in support of these different positions, among which there does not appear that perfect harmony which might be desired. If indeed the various cases are not wholly inconsistent, it must be admitted that the criteria, if any there be, which might serve to reconcile the decisions, have not, in the discussion of the subject, been kept very distinctly in view. To a certain extent, the cases may doubtless be reconciled; and it

may be well to ascertain, if it can be done by a cursory view of them, in what the inconsistency, if any, exists.

In the first place, it may be observed, that the form of the action is not wholly unimportant. There are many cases, where the plaintiff has an election to declare in contract or in tort; and where by adopting one form he may join his cause of action with a count sounding exclusively in contract, and by adopting the other he may join it with one originating exclusively in tort. In such cases, where the declaration is decidedly of one kind or the other, its form will determine the character of the action. Indeed, where such is not the case, and where an action of one kind only can be sustained, the declaration may be so decidedly of a different character in its form, as to be inappropriate and unsustainable. No reason can be given in short, why the character of the declaration, if it be impressed with decided and distinctive features, is not equally decisive of the nature of the action as in other cases.

These remarks may possibly serve to illustrate some of the cases.

The case of *Boson v. Sanford*, Salk. 440, was an action upon an express contract. The defendants are not alleged to have been common carriers, but their liability is put in the declaration upon the ground of a contract alone. It was an action of assumpsit in form. See remarks of Lord Ellenborough in *Govett v. Radnidge*, 3 East, 68. Whether the defendants were common carriers in fact, does not appear from the report in Salkeld, nor indeed was it important, as the plaintiff proceeded upon a special undertaking. The same remarks apply to *Slater v. Baker et al.*, 2 Wils. 359. The plaintiff counted upon an express joint undertaking, and alleged as the ground of recovery a breach of the promise; and although there was evidence of misfeasance in the case, yet that was relied upon only as a breach of contract. Had the plaintiff declared in tort, the question would have been different.

*Powell v. Layton*, 5 Bos. & Pul. 365, is of the same character. The declaration proceeded upon an express undertaking; and the case is put by Chief Justice Mansfield upon that ground. The case did not require a decision upon the question, whether, had the plaintiff declared in tort, upon the custom of the realm, the plea in abatement could be sustained. It is true the learned judge discusses that question; but how far his opinion coincides with authority remains to be seen.

*Max v. Roberts*, 5 Bos. & Pul. 454, is so similar to the last

case as to require no further remark. The ultimate fate of this case, however, deserves notice. Judgment passed at last for the defendants upon the ground that no sufficient promise was alleged in the declaration: 12 East, 89. This shows that the form of the action was decisive; for had the plaintiff declared in tort against the defendants, as common carriers, upon the custom of the realm, no averment of an express undertaking would have been necessary.

In *Bretherton v. Wood*, 7 Com. L. 345, 5 Brod. & B. 54, this explanation of the above cases is sustained in terms by Chief Justice Dallas.

It is said that the form of the declaration does not determine the nature of the action. This is true in a certain sense, but not the extent contended for. It is certainly true, that the plaintiff can not, by varying the form of his action, alter the intrinsic nature of his case. But it is also true, that the form of the declaration determines the character of the action; and, if the action be not adapted to the case, the suit fails for that reason. It is not contended, that a claim arising *ex contractu* can be converted into a tort by the mere forms of pleading. But it is believed that, where the party has an election to proceed as for a tort, or upon a contract, the form of the declaration determines the character and incidents of the suit. The distinction might be illustrated, by comparing the action of assumpsit on a warranty upon a sale with the action for a deceit, both of which have a common origin.

The great difficulty on this subject, however, has originated in a class of cases, where the plaintiff has declared either in tort without alleging any promise or undertaking, or has alleged a promise, but in such a manner as to leave it doubtful, upon the face of his declaration, whether a declaration in tort or contract was intended.

In such a case the subject-matter of the suit must be resorted to, for the purpose, first, of determining whether the action is sustainable, and secondly, if so, what proof is requisite to sustain it.

If the declaration be in tort, and no promise is alleged, then, if upon the facts a promise is necessary, or, in other words, if an action of assumpsit only can be sustained, it would seem that the declaration is defective, and the suit must fail. This is well illustrated by the case of *Max v. Roberts*, 12 East, 89.

If a promise is alleged, and yet the character of the declaration is equivocal, then again the subject-matter must be re-

sorted to; and it would seem, that if the cause of action be merely a breach of contract, the action, if sustained at all, must be sustained as an action of assumpsit and treated accordingly. On the other hand, if there be a positive tort, which might be sued for as such, it would result that the plaintiff might treat his action as one or the other.

The case of *Weall v. King et al.*, 12 East, 452, is an instance of the former kind. That action was in reality founded on a warranty. There was no ground for calling it deceit, because no *scienter* was alleged or proved. A warranty in terms was proved. It was very clear therefore, that the action must be treated as a case of contract, and the court very properly held, that, as the joint contract was not proved, the action failed.

A case of the latter description is that of *Dickon v. Clifton*, 2 Wils. 319. That was a case of a carrier, who suffered goods in his possession, through negligence, to be embezzled and lost. In such a case, there is no doubt that he might be charged, either upon assumpsit or tort. A case is there well put by Clive, J.: "Suppose I trust a shepherd with my sheep, and he puts his own dog among them, who worries them, this would be a tort, although I contract with him for wages, and he undertakes accordingly." He might also have added, "Suppose I trust a carrier with my goods, and he converts them to his own use."

*Slater v. Baker et al.* is also of the same description, where an action sounding in tort might doubtless have been sustained.

These cases depend, in some measure, upon the distinction between misfeasance and non-feasance. For where the *gravamen* is mere non-feasance, or mere non-performance of a contract, the action in general must be treated as founded in contract. Thus if a carrier receive goods to carry, and purloins them, there is a positive tort, and either trover or assumpsit will lie. If he receive pay for carrying, but neglects to call and receive them, it is a mere breach of contract. Of this character was the case of *Walcott v. Canfield*, 3 Consist. 194, which was a case of non-feasance only. And the same remark is applicable to *Boson v. Sanford*, *Powell v. Layton*, and *Max v. Roberts*, which were all cases of non-feasance.

On the other hand, where there is a positive tort, actions counting upon tort have been sustained: *Govett v. Radnidge*, 3 East, 62; *Coggs v. Bernard*, Ld. Raym. 909; *Dickon v. Clifton*, 2 Wils. 319; *Mitchell v. Tarbutt*, 5 T. R. 649; *Bretherton v. Wood*, 7 Com. L. 345.

Another material inquiry in connection with this question is,

in what cases is it necessary to set forth a contract, in declarations of this kind? The general rule is doubtless this, that whenever the duty or liability upon which the action is founded, is created by the contract between the parties, the contract should be stated, as in *Max v. Roberts*, *Weall v. King*, etc.

There are cases where the duty arises from the nature of the employment, and no contract is necessary to be stated or proved. Thus, in the case of a common carrier, the law imposes the liability; and it is only necessary to state the employment of a carrier as such. An express contract is not necessary. The rule may be illustrated by the following case: Suppose a carrier receives compensation for carrying goods, and agrees to call at a given place and receive them, and neglects to do so. Here is no liability imposed by law, and he can be made liable only upon his express contract. But if he receive the goods, and fail to deliver them, the ground of liability is different, and no express contract need be stated. The same rule would doubtless hold in the case of a surgeon.

With some exceptions of this kind, the general rule holds, that where an express contract is necessary to create the liability, it must be stated.

And it is agreed on all hands, that where a contract is necessary to be stated, it must be proved as laid. Hence, in these cases, if the plaintiff alleges a joint contract, and fail to prove it, he fails altogether in his action.

But here the question arises, with respect to which there has been so much discussion in the books. Suppose an action is brought in form in tort, upon a case of this kind, where no contract need be set forth, and where the tort consists in neglect or breach of duty, can the plaintiff recover against one of two joint defendants, without proving a joint contract? Or, if one only is sued, can the non-joinder of another equally liable be pleaded in abatement? On the one hand, we have the cases of *Powell v. Layton*, *Max v. Roberts* and *Buddle v. Wilson*, 6 T. R. 369; and on the other, *Dickor v. Clifton*, *Mitchell v. Turbutt*, *Govett v. Radnidge*, and *Bretherton v. Wood*.

The two first of these cases I have already remarked upon, as reconcilable with the other cases, upon the ground that they turn upon the form of the declarations, which count upon an express contract; although it is true, that the opinion of Sir James Mansfield was decidedly against the authority of the latter cases. *Boson v. Sanford* was also an action of assump-



sit, not counting against the defendants as common carriers upon the custom of the realm.

*Buddle v. Wilson* was an action against carriers upon the custom of the realm, and the authority of that case conflicts most decidedly with *Govett v. Radnidge*, *Mitchell v. Tarbutt*, and *Bretherton v. Wood*.

The decision of Lord Kenyon in *Buddle v. Wilson* was predicated expressly upon the case of *Boson v. Sanford*, and its accuracy depends upon the pertinency of that authority. If there be anything in the distinction attempted to be made between an action upon an express contract and one upon the custom of the realm, the cases are dissimilar. *Buddle v. Wilson* is the only case cited which is not reconcilable with *Bretherton v. Wood*, and similar cases, upon the grounds taken by Chief Justice Dallas in the latter case. I lay out of the question the case of *Weall v. King*, because there is nothing in that case but the express warranty to sustain the action.

Upon the score of authority, therefore, we have the single decision of Lord Kenyon opposed to the cases of *Mitchell v. Turbutt*, *Govett v. Radnidge*, and *Bretherton v. Wood*.

The authority of *Govett v. Radnidge* has been doubted; but, if we consider it analogous to the other cases already cited, where similar decisions were had, it seems well supported. If there be any doubt of the correctness of that case, it would seem to me to arise out of the question whether a contract, or undertaking of some kind, ought not to have been alleged. In this particular, that case and *Coggs v. Bernard* seem to be anomalous. The latter case, however, appears to sustain the former in this respect, and if it be conceded that an action can be sustained in such case, without such an allegation, and upon the same ground that it may be sustained against a common carrier, the same consequences must necessarily follow.

Upon principle it appears to me, with due deference to the learned judges, that the doctrine of the recent case in 7 Com. L. is correct. For if a contract is not necessary to be alleged, nor proved, I can not well perceive how any question of variance can arise, nor indeed how the precise terms of the contract are important. If the ground of the defendant's liability is a mere duty, and a tortious disregard of it, it would seem not to vary the ground, if a similar duty rested upon another.

In applying these doctrines to the case before us, we may remark, first, that it would follow from the cases of *Coggs v. Bernard* and *Govett v. Radnidge*, as also from the analogy of the

other cases, that the action as for a tort might be supported. The waste of materials, arising from the mismanagement of the defendant, is a positive injury growing out of a neglect or breach of duty, rather than a mere non-performance of the terms of the contract. Whether it was necessary, in this instance, to set forth a contract between the parties, is a question not so easily decided. We are of opinion however that it was; because we consider that the obligation or duty of the defendant rested wholly upon the contract. It is not a case where the mere employment of the party could create any definite obligation. The case of an ordinary mechanic is not like that of some other professions. The liability of such persons depends upon what they undertake. The defendant might have been employed upon the mill in question as a mere laborer in the way of his vocation. In order to render the defendant responsible for the success of the entire work, it should at least appear, that he had the oversight and direction of it; and of course it becomes necessary to set forth the contract by which he assumed that oversight and responsibility. The injury complained of is the imperfection of the whole; and the first question is, who is responsible? Not certainly every individual who was employed about the edifice, but he who had assumed the responsibility.

The contract being alleged, and being an essential part of the declaration, it becomes necessary to prove it as alleged. The case of *Bristow v. Wright*, Doug. 665, is a leading case on this subject. The lease set forth in that case, might perhaps have been dispensed with, but being alleged, it became necessary to prove it as laid; and there being a variance, the court held it to be fatal.

The remarks of Lord Ellenborough in *Weall v. King* are applicable to this case.

Upon the whole, although we are inclined to think that this action might be treated as sounding in tort, yet as in *Bristow v. Wright* (which was tort) the statement of the contract is material, and the variance is fatal.

It would be idle to send the case back for a new trial, as the verdict in favor of A. C. Geer, one of the defendants, can not now be disturbed; and so long as that remains, the plaintiff must necessarily fail.

The judgment against J. W. Geer is reversed, and judgment entered for the defendant:

PLEADING A TORT ARISING OUT OF A CONTRACT.—See *Stoyel v. Westcott*, 2 Am. Dec. 109, an action brought by an officer against the defendants, to whom the body of a person arrested by the plaintiff had been delivered, on their undertaking to deliver him to the plaintiff when desired, but who connived to procure an escape.

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## RICHARDS v. HUNT.

[6 VERMONT, 251.]

A COMPOSITION AND DISCHARGE OF A DEBTOR WILL BE SET ASIDE where it was induced by the representations of the debtor of his insolvency and poverty, it appearing that he had prior thereto fraudulently conveyed away all of his property.

BILL in equity, setting forth that the plaintiffs, having taken the body of the defendant in execution under a judgment, were induced by his representations of insolvency and poverty to compromise their claim for thirty-three and a third cents on the dollar and to discharge the defendant from their debt; that the defendant, however, fraudulently intending to deprive the plaintiffs of their claim, had prior thereto made fraudulent conveyances of his property to others in trust for himself; wherefore, the plaintiffs prayed that their compromise be set aside and the defendant be decreed to pay the balance of their claim.

By Court, PHELPS, J. The first inquiry in this case concerns the truth of the allegations contained in the bill. The debt and proceedings in relation to it are admitted in the respondent's answer, and representations similar to, and indeed substantially to the purport of those charged in the bill, are also admitted. The controversy, therefore, so far as facts are concerned, is narrowed to the simple question of the truth or falsity of those representations, and the character of the several conveyances of the respondent's property specified in the bill. [Here the judge proceeded to examine the evidence in the case, but his remarks upon that part of the subject are here omitted.]

Upon the whole we come to this conclusion: That the representations were substantially false—that they were intentionally so—and that they were designed to deceive the creditors of the respondent generally, and the orators in particular, and to induce them to accept a small composition for their debts. That property of the respondent to a large amount was passed from him, by the several conveyances specified, ostensibly for a good and valuable consideration, but in reality upon a secret

and fraudulent trust for the benefit of the respondent. That the purpose of these conveyances was to avoid the rights of his creditors, and to deceive them in relation to his means of satisfying their debts. That the orators were deceived by these representations, and these conveyances, and induced, by means of them, to accept a less sum for their debt than they would or ought to have done, had they been advised of the truth. This being our conclusion upon the matter of fact, the only question remaining is as to the law of the case.

This application presents, it must be confessed, a new case; and we are not furnished with any precedent of a decree such as the bill seeks, made under circumstances precisely like the present. In deciding therefore upon the rule which is to govern us, we must resort to first principles; taking as our guide the application of those principles as already made to analogous cases.

The rule, which requires good faith and an adherence to truth in human affairs, is a cardinal principle of equity jurisdiction. Nor is it confined to that system which, in this country, as well as in England, has been distinguished by the peculiar appellation of chancery. It is a part of our common law—it is a part of our system of ethics. It is a part of the moral and municipal code of every civilized people; and in every Christian community is universally acknowledged as resting upon higher and more sacred authority than mere human enactment. It is sustained by the philosophy of the heathen world—of that which has been built upon the supposed law of nature—by the moral code and religious faith of every enlightened people, and is to be found in every system which is at this day resorted to as illustrating the principles of justice, and throwing light upon its due administration. It is the root of a very considerable portion of our law, and the basis of a very extensive branch of equity jurisdiction.

In the application of this principle, the willful assertion of a falsehood, the willful suppression of the truth, in particulars material and important to be known, has been stamped with the character and followed by the consequences of fraud. And whenever the deception has proved effectual to the pecuniary injury of the party against whom it was directed, both courts of law and courts of equity have extended relief. The rules which govern both courts are the same, except so far as their different modes of action upon the subject lead to different forms of relief. As to how far the mere omission to state facts may be

deemed fraudulent under given circumstances, there has indeed been a difference of opinion. Where no representation is required, or given, mere silence has not been considered fraudulent. But where a representation is made, with the intent that it shall be relied upon, and it is so, any false assertion upon a material point, or suppression of a material fact, the contrary of which would be inferred from the tenor of the representation, is stamped by our law with fraud. So too where the party negotiated with is referred to the exercise of his own observation and judgment, yet if positive means of deception are used to mislead him in any material particular, the result is the same. At the same time, in order to lay the foundation of an action at law, or of equitable relief, it must appear that the party has been both deceived and injured.

Let us apply these rules to the case before us. That the respondent intended his representations should be relied upon, is evident from the circumstances under which, and the purpose for which, they were made. That they were relied upon by the orators is equally evident, from their conduct in accepting so small a portion in lieu of their whole debt. And that they were injured, is equally apparent, from the obvious ability of the respondent to pay the whole debt, which is disclosed by the case.

There is in this case, no ground for supposing the respondent ignorant of his own affairs. He must, therefore, be held to strict truth in his representations. Were these representations true? The tenor of them is, that the respondent was poor and destitute; that he had no resource for the maintenance of a numerous family, but his personal labor; that he had not the means of paying the debt; and that, if payment was insisted on, he should be driven to take advantage of the poor debtor's oath.

Now the reverse of all this was true. We have evidence of property, to the amount of some thousands, deposited by the respondent in the hands of his friends, and at his command. Here then was a positive misrepresentation, a *suggestio falsi*, and that in the important object of inquiry. There was also *suppressio veri*, in concealing the ample means in his possession for the payment of the debt; and in this point of view, it was fraudulent, as the fact concealed was inconsistent with the general tenor of his representations.

The case falls then within the ordinary rules for equitable relief in other cases. Is there any reason why those rules should not be applied? If equity requires good faith in all

business transactions, why not in this? Can any reason be given, why an appeal to the humanity and charitable feelings of a creditor should not be conducted with truth and honesty? Or shall we deny to the party defrauded of his property, through the medium of his benevolent and honorable feelings, the relief which we should afford to him if overreached in the competitions of avarice?

The want of a precedent precisely in point is no very strong argument in the case. Where the principle and its application are clear, we have no need of precedent. Fraud presents itself in forms infinitely various, and as new devices are adopted, as old ones are detected and defeated, so new practical applications of established principles must be made. The want of precedents may in some measure be accounted for, by the existence in other states, to whose jurisprudence we look for aid, of bankrupt and insolvent laws. But the principles which are applied to the practical operation of the laws where they exist, afford a strong argument from analogy applicable to this case. The severity with which fraudulent disclosures are there visited shows in what light the offense is regarded. It would be strange indeed, if what in one case is treated as equivalent to felony, should in another fall short of the milder appellation of legal fraud.

In some countries, deeds of composition are frequent. With respect to these, it is well known that all preferences of one creditor to another by secret means, are treated as fraudulent and void. There is still greater reason why an imposition practiced upon the creditors by the debtor himself, should be treated as fraudulent.

But we are not wholly without precedent. The case of *Dacosta v. Lanscrit*,<sup>1</sup> 2 P. Wms. 170, is very analogous to this. And the propriety of setting aside a release or discharge, obtained under similar circumstances, is fully recognized by Judge Story in *Phettiplace v. Sayles*, 4 Mason, 312. That case was very similar to the present. The plaintiff, however, failed in establishing the facts. But the opinion of the court, upon the legal question, was expressed most decidedly in his favor.

It is admitted on all hands, that this court might set aside the several conveyances of the respondent's property, which are specified in the bill, in favor of these orators; and that a court of law might treat them as void. But this would be of no avail so long as the discharge is in force. Yet the very fraud de-

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1. *De Costa v. Scandret*.

signed to be effected by these conveyances was consummated by obtaining this discharge. Shall the one be treated as void and not the other? Does the mere form in which the fraud appears alter its character? It must be a lame and impotent administration of justice, which would be impeded or arrested by such difficulties. Chancery looks at the substance and character of the transaction, without regarding the particular garb in which the party may choose to dress it.

It is true that general representations of a man's pecuniary situation may be made, sometimes, under peculiar circumstances, and may be influenced by hope or fear, by dejection or discouragement. The result of business transactions, especially if extensive, is always uncertain. It might happen, that such representations may be made, with perfect honesty, and at the same time may not be fully sustained in the sequel. But this consideration appertains rather to the inquiry as to fact. It is certainly true that regard is to be had to such circumstances, in ascertaining the party's intent. But there is no danger in insisting upon good faith and common honesty, nor in holding, that where willful falsehood is resorted to, more especially if a settled purpose to deceive is deliberately and perseveringly executed, that the party shall be responsible for the consequences of such a course.

It is argued, that general representations, such as the one set forth in this bill, are not usually relied on, and probably were not in this instance; and that men in the situation of the orator generally examine for themselves into the state of their debtor's property.

Whatever weight there may be in this argument recoils with increased force upon the respondent. The orators, it appears from the evidence, did examine into the situation of his affairs, and what did they find? They found his property apparently gone from him—conveyance after conveyance on record, for considerations apparently good; and, in short, they found about him the usual indications of poverty. All this, however, was factitious. False colors were held out; false appearances were created; the facts were perverted, and, under the influence of this systematic chicanery, they were led to a false conclusion, deceived, and defrauded. Although they may have pursued their own course of inquiry, and exercised their own observation and judgment, yet positive means were used to mislead them, even here. This, as already observed, is equally fraudulent with positive assertion.

On the whole, we are satisfied that the application of the most familiar principles to the facts as proved requires a decree for the orators for the balance of their debt.

Decree accordingly.

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SUPPRESSIO VERI OR SUGGESTIO FALSI is sufficient ground for rescinding a contract: *Waters v. Mattingly*, 4 Am. Dec. 631; *Peebles v. Stephens*, 6 Id. 660; *Beard v. Campbell*, 12 Id. 362; *Mills v. Lee*, 17 Id. 118; *Campbell v. Wittingham*, 20 Id. 241.

COMPROMISE OF A DOUBTFUL CLAIM will not be set aside, except for fraudulent misrepresentation or concealment of facts, or for such imposition as amounts to unfair and unconscientious dealing: *Mills v. Lee*, 17 Am. Dec. 118.

A CREDITOR COMPOUNDING FOR HIS ENTIRE DEMAND, whether he can sue the debtor on a claim existing before the execution of the composition deed, where the claim was fraudulently concealed by the debtor: *Russell v. Rogers*, 25 Id. 574.

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## KELLOGG v. ROBINSON.

[6 VERMONT, 276.]

A COVENANT THAT THE GRANTEE SHALL KEEP AND MAINTAIN A PARTITION FENCE between the lands conveyed and those of the grantor runs with the land.

A DECLARATION ON A BREACH OF A COVENANT against incumbrances is bad upon demurrer, when the incumbrance is created by an ancient deed with which the title of neither party to the action is connected.

COVENANT broken, alleging an incumbrance in a deed from one Robinson to Smith, in the nature of an agreement to maintain and keep fences between the lands conveyed and those of the grantor. It did not appear from the complaint that the defendant, whose deed to the plaintiff contained the covenant against incumbrances, derived title under the deed containing the covenant to erect fences. Demurrer. Judgment for the plaintiff. Defendant excepted.

*M. S. Bennet*, for the defendant.

Names of counsel appearing for the plaintiff are not known.

By Court, PHELPS, J. The sufficiency of this declaration depends upon the inquiry, whether it shows, upon its face, a subsisting legal incumbrance upon the land conveyed. It is argued on one side, that the "stipulation," as it is termed, in the deed from David Robinson to Noah Smith is in the nature of a mere personal covenant between the parties to that deed, not running with the land, nor binding upon the subsequent grantees. On the other hand, it is insisted, that the obligation



attends the inheritance, and is of course an incumbrance upon the land, into whatever hands it may pass.

There are certain covenants concerning the realty so necessarily connected with it as to pass with it of necessity, and operate between other parties than the original parties to the covenant. Of this nature is the covenant of warranty in the deed of bargain and sale—a covenant against waste—a covenant to repair buildings—a covenant not to cut timber, or plow up meadow land, and the like. The reason why these covenants run with the land is, that unless they do so, they can not be effectual; nor can the party for whose benefit they are created derive from them the benefit intended.

There is another class of covenants of a doubtful or equivocal character, and which may be treated either as merely personal, or as annexed to and running with the land. With respect to these, it is doubtless competent for the contracting parties to make them either the one or the other, as they think expedient. When, therefore, the party covenants for himself and his assigns, it evinces an intent to bind the land, and the obligation becomes connected with, and qualifies his estate. Thus it is said, in *Spencer's case*, 5 Co. 16: "If lessee covenants for himself and his assigns, to build a new wall upon the land, this shall bind the assignee, because named, and he is to take the benefit thereof."

The latter part of this reason, however, has reference to another class of cases, where the thing covenanted for has no necessary connection with the land, and with respect to which no tenant could legally bind another. Thus it is said by Coke: "But although the covenant be for himself and his assigns, yet it is otherwise, if the thing to be done be merely collateral to the land and not concerning the thing demised in any sort, as a covenant to build a house, upon the land of the lessor, not parcel of the demise."

It seems therefore, that with respect to the question, whether a given covenant runs with the land or not, the nature and purpose of the covenant is the first criterion, and, where this is not decisive, the intent of the parties, as expressed in their deed, will determine. "When," says Lord Coke, "the covenant extends to a thing in esse parcel of the demise, the thing to be done is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, although he be not bound by express words; as if the lessee covenant to repair houses," etc. But if the thing be

collateral, as he expressed it, and not concerning the land, the assignee is not bound if named.

What then is the nature of the "stipulation," or covenant in question? It is thus set forth in the declaration: "And the said Henry further says, that in the deeds of said premises from David Robinson to Noah Smith, dated in 1783 and 1797, is contained a stipulation that the said Noah is to make the whole of the fence, and to maintain the fence around said premises, or that part of said fence adjoining said Robinson's land."

We take the fence described to be the partition fence between the premises conveyed and David Robinson's land; and of course necessary to be maintained, for the benefit of the occupier. The stipulation contains two parts: 1. "To build the fence." Whether the obligation thus far would be considered as running with the land, is perhaps somewhat questionable. In *Bally v. Wells*, 3 Wils. 25, it is said, that "if lessee covenants to build a wall, and assigns over his estate, the grantee of the reversion shall have covenant against the assignee, notwithstanding the covenant wants the word 'assigns;' yet every assignee, by accepting the possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants. So, for a covenant which runs with the land, an action lies for or against the assignee, although not named, *quia terra transit cum onere*." Upon the authority of that case, the obligation would be held to run with the land. But it is not necessary to decide this point, as that part of the covenant has probably been long since at an end.

The second part of the stipulation is, "to maintain the fence," etc. This is an obligation *in perpetuum*. That it concerns the land, and is not "collateral," is not to be questioned. It is equally clear, that Robinson, the covenantee, could not have the full benefit of it, unless it runs with the land. It is not to be supposed that the parties intended Smith should be bound after parting with the land, nor that the obligation to maintain the fence should cease with a transfer of the estate. Besides, where is the distinction between a covenant to repair houses (the case put by Coke) and a covenant to maintain the fences? Where the covenants run *in perpetuum*, there can be no difference.

It is argued, that the fence not being *in esse* at the date of the covenant, the latter does not run with the land. The decision in *Wilson* conflicts with this argument. At the same time, such a covenant certainly concerns the land, a thing in

*esse*. The maintenance of fences is necessary to the enjoyment of the estate. And the objection is no better founded than a similar objection to a covenant to repair houses would be, upon the ground that the particular separations were not in *esse* at the date of the covenant.

If we consider the fence itself as the principal thing, yet the argument has no better foundation. The first part of this stipulation is satisfied by building the fence: then comes the latter part, to maintain it; which, when it becomes operative, concerns a thing in *esse*. It has reference to a thing contemplated as existing, and which must actually exist when the covenant takes effect. If we regard the stipulation in the light of a condition of the grant, and in a deed poll, it could hardly be otherwise—all difficulty vanishes. If it be a condition, instead of a covenant, whoever takes the estate, takes it *cum onere*. We are of opinion upon the question, that a covenant in a conveyance, to build and maintain the fences, runs with the land.

There is, however, another objection to this declaration, which is not so easily obviated. Admitting that the deed from David Robinson to Noah Smith created an incumbrance upon the land in the hands of Smith, yet this declaration shows no privity in estate between him and either of these parties. It is not alleged that the defendant derived her title from N. Smith, nor are any facts stated, from which it appears that she, or her grantee, the plaintiff, is privy to, or bound by the terms of that deed. For aught that appears, the title of the defendant, and which she conveyed to the plaintiff, might have been derived from a different source, and might have been adverse to the title of Robinson. For this reason the declaration is most decidedly bad.

Judgment that the declaration is insufficient.

The plaintiff, on motion, had leave to amend.

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COVENANTS RUNNING WITH THE LAND.—Warranty: *Donnell v. Thompson*, 25 Am. Dec. 216; *Comstock v. Smith*, 23 Id. 670; *King v. Kerr*, 22 Id. 777; *Sweet v. Green*, 19 Id. 442; *Cummins v. Kennedy*, 14 Id. 45 and note; *Birney v. Hann*, 13 Id. 167; *Booth v. Starr*, 6 Id. 233; *Hamilton v. Cutts*, 3 Id. 222. In the note to *Fullon v. Stuart*, 15 Id. 544, various covenants are referred to, which have been decided to run with the land.

## STATE v. TRASK.

[6 VERMONT 355.]

FOR A DEDICATION OF LANDS TO PUBLIC USE no particular form of words is necessary; it may be without deed.

THERE MUST BE A CLEAR INTENTION TO DEDICATE and an act of acceptance on the part of the public.

LONG-CONTINUED USAGE IS EVIDENCE of the public right, but must be considered in connection with the intention of the owner to dedicate.

A PART OF THE LAND DEDICATED MAY BE APPROPRIATED and the residue relinquished.

THE QUESTION OF APPROPRIATION is for the jury.

WHERE THE PUBLIC RELY UPON USAGE as evidence of the right, that right can not be more extensive than the usage.

PARTS OF A DEED INCONSISTENT WITH THE MANIFEST INTENT will be rejected.

EVEN WHERE THE PARTICULAR USE HAS CEASED, the public have acquired a right which can not be disregarded. Lands were dedicated for the erection of a court-house; relying on this dedication, dwellings were built bordering on the lot, and the dedication was pronounced irrevocable, notwithstanding the state court was afterwards moved to another town.

INDICTMENT. The opinion substantially states the case. The deed under which the state claims was executed in 1784, the house complained of was moved into its present position in 1791. In 1796 the state courts were removed to another town, and the United States courts have been since held in the court-house on the land in question. Verdict, guilty.

Exceptions were taken and allowed.

*Aiken*, for the respondent.

*Coolidge*, *contra*.

By Court, *PHELPS, J.* This is an indictment for a nuisance. The offense charged consists in the respondent's having placed a dwelling-house upon a part of what is alleged to be a public common or highway, in the town of Windsor, and in maintaining it there to the common nuisance of the public. The act complained of is not denied. But whether the respondent has a legal right to maintain the building in the place where it is located, is the point in issue.

The prosecutor relies upon having shown a dedication of the *locus in quo* to public use. For this purpose, he offered in evidence at the trial, a deed of conveyance from one *Hastings* to *Nathan Stone* and sundry others, which is appended to the case, and which purports to convey the premises in trust, for certain public uses in the first instance, and upon failure of that

use, then to the use of the grantees and their associates, subscribers to a fund for erecting a court-house. To the admission of this deed as evidence, the respondent objected; and to the decision of the court overruling the objection and admitting the evidence, the first exception is taken.

It is objected that this deed attempts to limit an use upon an use, which at law can not be done. The true interpretation of this deed, however, in this particular, seems to be, that the grantees take in trust, in the first instance for the public, and in case that use fails, then and upon that contingency to the use of themselves and their associates. It is not the case of an use upon an use, but rather a case of contingent or alternative uses, and one of very frequent occurrence in the law. It is of the same character with family settlements, in trust for eldest and other sons in succession. The uses are not contemplated as existing together—the latter being inoperative, while the former continues, and taking effect when the former is determined. The deed is very unskillfully drawn, and although some parts of it may be repugnant or inconsistent, yet it by no means follows that the deed is void. If the intent of the parties is clearly ascertained upon the face of the deed, courts will give it effect; and those parts which are inconsistent and repugnant to that intent will be rejected. There is one part of the deed which seems to limit the use to the grantees and their associates for certain public uses. This is apparently limiting an use upon an use; but this is clearly inconsistent with another part, which limits the use in the first instance to the public, with a contingent and resulting use to those who paid the consideration. The first clause was probably introduced as mere words of form, without apprehending their import, and is clearly repugnant to the manifest intent of the grantor. We have no difficulty therefore in giving effect to the deed, according to that intent.

That the deed is evidence of a design to dedicate the land to public use, we think apparent. Although it is inaptly drawn, yet enough we think appears to establish the intent. The recital of the consideration or motive of the grant—the power to convey to the county—and, above all, the express declaration of the use and purpose to which the land is to be applied, indicate, beyond a doubt, a trust in the grantees for the public use.

The title indeed remains in the grantees, but a conveyance to the county is not essential to a dedication, and even if such a conveyance had been executed and the county had relinquished the particular use, still the land, or a portion of it,

might, and probably would, have been irrevocably dedicated to public use. No particular form of words is necessary for that purpose. A dedication may be, and often is, without deed. All that seems necessary, is that the owner shall clearly manifest an intention to dedicate the land to public use, and that the public should, relying upon that manifestation, have entered into the use and occupation of it, in such manner as renders it unjust and injurious to reclaim it. Much of our public property rests upon this footing. Plots of land have been set apart for the interment of the dead—they have been used for that purpose, with the assent of the owners, and they have been hallowed by the use. The right of the owner to reclaim them has been denied. See *Beatty v. Kurtz*, 5 Pet.<sup>1</sup> So public squares and highways have been laid out by the original owners of city and village sites. Building lots have been sold and built upon, bounded upon these public squares, and from the moment this has been done with a just understanding on the part of the purchasers that the land is permanently devoted to public use, the dedication has become irrevocable. This result has grown out of the appropriation of land for the erection of churches, town and county buildings, etc. Even where the particular use has ceased, the public have acquired a right, which can not be disregarded. Long-continued usage is evidence of such right, but it is evidence merely. The circumstances of that usage are to be considered, and more especially whether the intention of the owner to dedicate to a general public use is found. Nor is any particular length of time necessary to acquire that right. Such time, and such only, is requisite, as suffices to acquire that interest, with the assent and concurrence of the owner, which would render it fraudulent in him to resume his rights. Enjoyment for a given period, for more than fifteen years, has generally been considered as sufficient *prima facie* evidence of a right in the public; but enjoyment for a much less period, with other circumstances, may perfect it.

As evidence of an intent, on the part of Hastings, to dedicate this land to public use, the deed was certainly admissible. The quantity is evidently larger than would be necessary for the site of a court-house only. He doubtless contemplated the usual space to be laid open about it, and his deed was an assurance to the public, that this land, or so much of it as should be required, should be appropriated to that use. If then the public have availed themselves of this act of dedica-

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1. 2 Pet. 568.

tion, and the land can not now be reclaimed without injury to the public, and to individuals who have invested their money in adjoining property, at an enhanced price, it is too late to reclaim it. There was therefore no error in admitting this deed.

The deed however being admitted, a serious question arises as to its effect, in connection with the other evidence in the case. And this brings us to consider the charge of the court below, upon the whole case as here presented. In doing this, it becomes necessary to advert to the evidence on both sides.

On the part of the prosecution it appears, that the building in question is located upon the land specified in the deed from Hastings to Stone and others, and that the land, excepting the part covered by this building, has been occupied and enjoyed by the public, from the date of the deed to the present time.

The respondent, on his part, gave in evidence a deed of the premises in dispute from one Grandy to S. Conant, dated in 1795, and a chain of conveyance, bringing down the title of said Grandy to himself; and also evidence tending to prove, that from 1791 to the present time, the building complained of has stood in its present location.

It is remarkable that there is no evidence of the title of Hastings, except what is to be derived from subsequent possession and his deed. Had his previous title been established, the only question in the case would have been, whether the statute of limitations would run in favor of the respondent, against the public. As it is, the title of Hastings depends altogether upon the possession, and is established so far and no farther than that possession goes. There is no ground for assuming that the title of the respondent was derived from Hastings; but, as the possession of the land for private purposes, is inconsistent with the alleged right of the public, the two claims must be taken to be adverse. In this point of view it is apparent that no title is proved in the public, unless it has been acquired by occupancy. There is no reason for applying the rule, that the statute does not run against the public; but the case presents the simple question of fact, how far the title of the public has been established by subsequent enjoyment. Had that title been established by other evidence, and the attempt had been to divest it by adverse possession, the case would have presented a different question. But when the attempt is to support the public claim by evidence of possession, it is most clear that evidence of adverse possession in the respondent is admissible to contradict it; and if the possession is not made out, the attempt

fails. The title of Hastings might have been good, as to that part which has been occupied by the public, and not so as to the residue.

If, however, we assume, as the county court seems to have done, that Hastings was the common source of title on both sides, still a different view of the subject presents itself from that presented by the charge.

From what has already been said, it will be inferred, that to render a dedication to public use binding, it is necessary, not only that there be some act of dedication on the part of the owner, but there must also be something equivalent to an acceptance on the part of the public. In analogy to grants and other conveyances, the concurrence of two parties seems necessary to pass the right. Towns and cities may be projected—streets, public squares and roads may be laid out, but if no town or city is built, there is no effectual dedication. So in this case, had no court-house been built, the owners might have reclaimed the land; yet even in that case, had the owners permitted it to be appropriated as it has been, they might at this day be bound.

If this position be correct, it follows that there may be an acceptance and appropriation in part, and not for the whole. A piece of land may be dedicated to public use, and yet the public convenience may not require the whole of it; a part may be in fact appropriated, and the residue may, by common consent, be relinquished. Where this is done, and the owner left to erect valuable buildings upon the land, there seems to be the same reason why the public should not reclaim it as has already been given why the owner should not do so, after an actual appropriation. In this instance, there is strong evidence of such relinquishment. The fact that it was not necessary to the public, their never having occupied it, and the arrangement of the public streets and buildings rendering it of no use to them, seem to warrant the owner in applying it to private use.

The question whether the land in dispute had ever been in fact appropriated to public use, should have been left to the jury. They should have been charged, that cases may exist, where a dedication is accepted in part, and where a general and more extensive appropriation of land to public use may be limited, restricted, and defined by long-continued use. That in this case, the public may have availed themselves of so much of the land proffered as was necessary for the purposes of the grant, and waived it as to the residue. And at all events,



where the public rely upon usage as evidence of their right, the right can not be more extensive than the usage. There was abundant evidence in the case requiring such a charge. It appeared, that as early as 1791, the building occupied its present location; and previous to that date sufficient time had not elapsed to create evidence of a right in the public.

We are of opinion that the charge was erroneous; and that the error consisted principally in these particulars, viz.: 1. In assuming the legal title to be in Hastings at the date of his deed, when there was no evidence to that effect, except a subsequent possession, which did not extend to the land in controversy. 2. In assuming that the respondent's title emanated from Hastings, which the charge seems to do, and which is necessary to sustain the charge, upon the point of possession. 3. In overlooking the fact, that the public right rested upon usage, and that the burden of proof as to that usage, whether regarded as confirming the title of Hastings, or as direct evidence of the public right, rested upon the prosecutor. And 4. In the inference, "that the respondent could only be justified by a right acquired by adverse possession," and that the burden of proof, as to the character of that possession, rested upon him.

For these reasons, the judgment must be reversed and a new trial granted.

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**DEDICATION TO PUBLIC USE—DEFINITION AND HISTORY.**—A dedication is an appropriation of land to some public use, made by the owner of the fee and accepted for such use by or on behalf of the public: Angell on Highways, 135. It is purely of common law origin: Id. But it is only in very modern times that the subject has assumed much importance. As recently as 1843, Chief Justice Gibson, having occasion to consider the topic in *Gowan v. Philadelphia Exchange Co.*, 5 W. & S. 141, said: "Though the anomalous doctrine of dedication to public use, or more properly of a grant to the public without the intervention of a trustee, began so late as 1732, it is of still more modern growth. The first trace of it is found in *Re v. Hudson*, 2 Str. 909, decided in that year, and the next in *Lade v. Shepherd*, Id. 1004, which was decided three years afterwards. It was then suffered to sleep till 1790, when it was awakened by the *Trustees of Rugby Charity v. Merryweather*, 11 East, 375, note; and for the last thirty years it has been, of all others, the subject most frequently agitated in regard to grants of highways, and most prolific in decisions, without having its principles very definitely settled; at least, nothing very definite or of general application seems to have been extracted from the cases by those who have collected. Perhaps we have not even yet materials enough to generalize."

A DEDICATION MAY BE EITHER STATUTORY or according to the common law. The former arises where a person complies fully with the provisions of statutes enacting that certain formalities, when observed, operate as a dedication of lands to the public. Such dedication usually is made by recording a map or plat of land in a public office, acknowledged and executed in the

manner prescribed: *Downer v. St. Paul etc. R. R. Co.*, 23 Minn. 271; 2 Dill on Munic. Corp., sec. 491; *Railroad Company v. Schurmier*, 7 Wall. 272; *City of Des Moines v. Hall*, 24 Iowa, 234; *Ragan v. McCoy*, 29 Mo. 356; *Detroit v. Detroit and Milwaukee R. R. Co.*, 23 Mich. 173; *Mansur v. Haughey*, 60 Ind. 364. The effect of statutory dedications is generally indicated by the statute itself, and the fee of the soil passes to the public, to the proprietors of adjacent lots, or remains in the grantor, as the language employed warrants the one or the other construction: *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Ragan v. McCoy*, 29 Mo. 356; *Randal v. Elder*, 12 Kan. 257; *City of Des Moines v. Hall*, 24 Iowa, 234. Common law and statutory dedications are different in that the former operates by estoppel *in pais*, while the latter operates by grant: *Denver v. Clements*, 3 Col. 472; 2 Dill on Munic. Corp., sec. 491. But an incomplete statutory dedication may become one at common law by an acceptance and appropriation by the public: *Fulton v. Mehrenfeld*, 8 Ohio St. 440.

**COMMON LAW DEDICATIONS.**—A very clear summary of the various questions involved in a common law dedication to public uses is thus made in *Harding v. Jasper*, 14 Cal. 642: "In dedication no particular formality is necessary; it is not affected by the statute of frauds; it may be made either with or without writing by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient, the dedication being proved in most, if not all, of the cases by matter *in pais* and not by deed. The vital principle of the dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete—precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway." In considering the subject of common law dedications, we shall pursue the order suggested by this description.

**WHO MAY DEDICATE.**—A dedication must be made by the owner of the title to the land: *Kyle v. Logan*, 87 Ill. 64; *Gentleman v. Soule*, 32 Id. 271; *Fiak v. Havana*, 88 Id. 208; *Hoole v. Attorney-general*, 22 Ala. 190; *Leland v. Lonsdale*, 2 Or. 46; *Lonsdale v. Portland*, Deady, 1, 39; *Venata v. Jones*, 42 McLean, 641. A mortgagor can not make a dedication of the mortgaged premises: *Hoole v. Attorney-general*, 22 Ala. 190; nor can a tenant for years bind his reversioner by a dedication to public use: *Schenley v. Commonwealth*, 36 Pa. St. 29; *State v. Atherton*, 16 N. H. 203; but a married woman may dedicate her lands for a public highway: *Id.* A mere occupant of public land without other estate or interest therein than the bare possession, can not charge the lands in the hands of any subsequent occupant with a dedication: *Lonsdale v. Portland*, Deady, 1, 39; and a mere stranger, unless authorized to do so, can no more dedicate the land of another to public use than he can convey it by deed: *Bushell v. Scott*, 21 Wis. 457; and what one in possession, not the owner, may have said in regard to dedicating the land,

amounts to nothing: *Kyle v. Logan*, 87 Ill. 64. An administrator, it seems, may dedicate lands of his decedent; *Logansport v. Dunn*, 8 Ind. 378. A municipal corporation to whom lands have been granted, may dedicate them to public use: *State v. Woodward*, 23 Vt. 92; *San Francisco v. Calderwood*, 31 Cal. 585; *Boston v. Leccard*, 17 How. (U. S.) 426; and a railroad corporation may do the same, where there is nothing in the charter prohibiting it: *Green v. Canaan*, 29 Conn. 157. In *Prudden v. Lindsley*, 29 N. J. Eq. (2 Stew.) 615, the *locus in quo* was asserted to have been dedicated as a highway by the defendants, trustees of the town of Green Village, to purchase and appropriate land for the use of the village school. On the other hand, it was contended, that the trustees had not the power to make a valid dedication. But said Dixon, J.: "The trustees are legal owners of the land, but as the purposes for which they own it are expressed in the deed by which they hold the title, their acts can not be allowed to violate their trust. That trust, however, is of a somewhat indefinite character, and therefore, a discretion is vested in the trustees as to the mode in which it may be best subserved; and within the range of this discretion, their acts are lawful and binding. These plain principles, so easily stated, but perhaps not so easily applied, are the criteria for testing the power to dedicate. If the highway claimed by the complainant could be laid out by the trustees in furtherance of their trust, then their dedication is valid. *Ree v. Leake*, 5 Barn. & Adol. 469. \* \* \* Therefore, the question whether such dedication can be made, is one of fact, to be determined by the conditions of each case."

**PURPOSES FOR WHICH DEDICATIONS MAY BE MADE.**—At common law, lands could only be dedicated for a common highway. If an open square was intended merely as an enlargement of the highway, and intended to be used as such, it would fall within the purposes for which a dedication could be made. But for other uses, the common law would not recognize a setting apart of lands by dedication: *Baker v. Johnston*, 21 Mich. 319; *Mowry v. City of Providence*, 10 R. I. 52; *Pearsall v. Post*, 20 Wend. 111; S. C., 22 Id. 425. "English cases," it is said in *Mowry v. City of Providence*, "have never pressed the doctrine of dedication beyond rights of way or travel, leaving other claims by portions of people to stand on the ground of customary or prescriptive right. \* \* \* But in this country, the doctrine of dedication has been applied by the supreme court of the United States, and other courts, to public squares, to common lots, burying grounds, school lots, and lots for church purposes, etc., and pious and charitable uses generally, and in many cases where the use was either expressly or from the necessity of the case limited to a small portion of the public."

Instances of dedications for a public square will be found in *Hoadley v. San Francisco*, 50 Cal. 265; *Warren v. Mayor of Lyons*, 22 Iowa, 351; *Carter v. City of Portland*, 4 Or. 339; *Grogan v. Hayward*, 6 Pac. C. L. J. 351, Cir. Court for Dist. of Cal.; *Abbott v. Mills*, 3 Vt. 526; *Cincinnati v. White*, 6 Pet. 431; *Commonwealth v. Rush*, 14 Pa. St. 186; *State v. Wilkinson*, 2 Vt. 480; *Watertown v. Cowen*, 4 Paige, 510; and of dedications for a public park in *Price v. Thompson*, 48 Mo. 363; *Price v. Plainfield*, 40 N. J. L. 608. In *Carter v. City of Portland*, 4 Or. 339, it is said that the dedication of squares and parks may be established in the same manner as in case of streets and alleys. And in general: "The binding effect of the dedication of streets, highways, urban parks, walks, and pleasure grounds, is now too well settled to admit of question." *Mankato v. Willard*, 13 Minn. 23. Other public uses for which dedications have been made, are burial grounds: *Mowry v. Providence*, 10 R. I. 52; *Hunter v. Sandy Hill*, 6 Hill, 407; *Boyce v. Kal.*

baugh, 47 Md. 334; S. C., 28 Am. Rep. 464; school purposes: *Potter v. Chapin*, 6 Paige, 639; *Carpenteria School District v. Heath*, 6 Pac. C. L. J. 898; court-houses, churches, and other public buildings: *New Orleans v. United States*, 10 Pet. 712; *Hunter v. Sandy Hill*, 6 Hill, 411; "For the Lutheran church:" *Beatty v. Kurtz*, 2 Pet. 566; a spring of water: *McConnell v. Lexington*, 12 Wheat. 582; wharf, public landings, and levees: *O'Neill v. Annett*, 27 N. J. L. (3 Dutch.) 290; *Railroad Co. v. Schurmier*, 7 Wall. 722; *Mankato v. Willard*, 13 Minn. 23; *Gardner v. Tisdale*, 2 Wis. 152; *Godfrey v. City of Alison*, 12 Ill. 29; a quay: *New Orleans v. United States*, 10 Pet. 714. Dedications for streets are the most common, and examples of them abound in the cases above cited, and will be found in the citations below where the subject of dedications according to maps or plats are discussed. Although at one time it was doubted that a blind street, a *cul de sac* could be the subject of dedication: *Wood v. Veal*, 5 Barn. and Ald. 456; *Holdans v. Trustees of Cold Spring*, 23 Barb. 103, yet it is now settled that a *cul de sac* is capable of dedication: *Bateman v. Bluck*, 14 Eng. L. and Eq. 69; *People v. Kingman*, 24 N. Y. 559; *Stone v. Brooks*, 35 Cal. 489; *Bartlett v. Bangor*, 67 Me. 460; *Matter of Twenty-third Street*, 19 Wend. 128.

HOW A DEDICATION IS MADE.—THE INTENTION TO DEDICATE.—To constitute a valid and complete dedication, two things must occur, to wit: an intention by the owner to dedicate, and an acceptance by the public of the dedication: *San Francisco v. Carnavan*, 42 Cal. 541, and cases *infra*. An intention on the part of the owner of the soil to dedicate is essential: *Fisk v. Havana*, 88 Ill. 208; *Kyle v. Logan*, 87 Id. 64; *Illinois Ins. Co. v. Littlefield*, 67 Id. 368; *Harding v. Hale*, 61 Id. 192; *Rees v. Chicago*, 38 Id. 322; *Grube v. Nichols*, 36 Id. 92; *Marcy v. Taylor*, 19 Id. 634; *Fairfield v. Morey*, 44 Vt. 239; *Mansur v. State*, 60 Ind. 357; *Same v. Haughey*, Id. 364; *Morgan v. Railroad Co.*, 96 U. S. 716; *McCormick v. Baltimore*, 45 Md. 512; *Mayor of Jersey City v. Morris Canal and Banking Co.*, 12 N. J. Eq. (1 Beas.) 547; *Niagara Falls Sus. Bridge Co. v. Bachman*, 66 N. Y. 261; *Cook v. Harris*, 61 Id. 448; *Pierpoint v. Town of Harrisville*, 9 W. Va. 215; *Green v. Berthea*, 30 Ga. 897; *Mayor of Madison v. Booth*, 53 Id. 609; *Downer v. St. Paul and Chicago R. R. Co.*, 23 Minn. 271; *State v. Welpton*, 34 Iowa, 144; *Grube v. Wells*, Id. 148. The intention to devote the land to public use must be clear: *Mansur v. State*, 60 Ind. 357; *Same v. Haughey*, Id. 364; *McCormick v. Baltimore*, 45 Md. 512; *Mayor of Jersey City v. Morris Canal and Banking Co.*, 12 N. J. Eq. (1 Beas.) 547; *Pierpoint v. Town of Harrisville*, 9 W. Va. 215; *Fairfield v. Morey*, 44 Vt. 239; certain: *Fisk v. Havana*, 88 Ill. 208; *Mansur v. State*, 60 Ind. 357; *Same v. Haughey*, Id. 364; positive: *Pierpoint v. Town of Harrisville*, 9 W. Va. 215; and unequivocal: *Fisk v. Havana*, 88 Ill. 209; *Mansur v. State*, 60 Ind. 357; *Same v. Haughey*, Id. 364. The acts and declarations of the owner indicating the intent "must be unmistakable in their purpose, and decisive in their character:" *Niagara Falls Sus. Bridge Co. v. Bachman*, 66 N. Y. 261; *Cook v. Harris*, 61 Id. 448. Moreover, the dedication must be free and voluntary: *Rees v. Chicago*, 38 Ill. 322. Many of the questions arising out of supposed dedications turn on the intent of the dedicator. To justify a claim that title to a tract of land has been divested by dedication, the proof should be very satisfactory, either of an intention to dedicate, or of such acts and declarations as should equitably estop the owner from denying such intention: *Kyle v. Logan*, 87 Ill. 64; *Kelly v. Chicago*, 48 Id. 388. As it will be presumed, where the facts and circumstances of the case clearly warrant it, so that presumption may be rebutted and altogether prevented from arising by circumstances incompatible with the supposition that any

dedication was intended: *McCormick v. Baltimore*, 45 Md. 512; *Mansur v. Haughey*, 60 Ind. 364. For example: where the owner of land through which a road passes has permitted it to be used for that purpose, he keeping up a gate at each end to protect his plantation, the public have only acquired a restricted prescriptive right, and to that extent and with that qualification are entitled to enjoy it: *Green v. Berthea*, 30 Ga. 897; *Mayor of Madison v. Booth*, 53 Id. 609. And so the leaving out part of a man's land in fencing, when done by mistake, repels the intent to dedicate: *Mansur v. Haughey*, 60 Ind. 364; *State v. Welpton*, 34 Iowa, 144; *Grube v. Wells*, Id. 148. Says Chief Justice Sawyer, in *Stone v. Brooks*, 35 Cal. 489: "As to the quantum and kind of evidence of this intention, the authorities are numerous, and not all of them consistent. But the law is reasonable in this respect as in most other matters. The peculiar circumstances of the country must be taken into account. While the general rule here is the same as in England, the facts which are held sufficient there might be held differently in this state. Indeed, in other new states of the Union, they have been so held." The same doctrine is laid down in *Harding v. Jasper*, 14 Cal. 642, with still more particularity: "It requires stronger proof of dedication, in the cases of roads in the country, than that of streets or lanes in a town or city: *Stacy v. Miller*, 14 Mo. 478; *Badeau v. Mead*, 13 Barb. 823; *Henins v. Smith*, 11 Metc. 241. In Angell on Highways, it is said, p. 127, sec. 151: 'An intention to dedicate must be obvious, and the same acts which would warrant the inference in cities and towns would be quite insufficient in sparsely-settled agricultural districts.'"

The intention is to be gathered from acts and declarations explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter: *City of Columbus v. Dahn*, 36 Ind. 330; *Morgan v. Railroad Co.*, 96 U. S. 716. The declarations of intent with respect to the land "up to a dedication made irrevocable by acceptance on the part of the public, there is no doubt of the propriety of admitting:" *Downer v. St. Paul and Chicago R. R. Co.*, 23 Minn. 271. In short, as it is said in the case of *Stone v. Brooks*, 35 Cal. 489, the idea of a dedication to the public use of land must rest on the clear assent of the owner in some way to such dedication. This assent may be proved by a deed or unsealed writing, or, as held by many courts, by parol: *Carter v. City of Portland*, 4 Or. 339; *Dummer v. Jersey City*, 20 N. J. L. (1 Spencer) 86; *State v. Catlin*, 3 Vt. 530; *McKee v. St. Louis*, 17 Mo. 184; *Hunter v. Sandy Hill*, 6 Hill, 407; *Post v. Pearsall*, 22 Wend. 425, 454; *Dover v. Fox*, 9 B. Mon. 200. In fact "dedications have been established in every conceivable way by which the intention of the dedicatory could be evinced:" *Morgan v. Railroad Co.*, 96 U. S. 716; *Godfrey v. City of Alton*, 12 Ill. 29. One who has negligently led the public to suppose that he has dedicated certain lands is estopped to deny his intention as to those who would be prejudiced: *Wilder v. St. Paul*, 12 Minn. 192; *Mansur v. Haughey*, 60 Ind. 364.

ACCEPTANCE OF THE DEDICATION.—The second of the before-mentioned requisites to a valid and complete dedication is that it should be accepted. So peculiar is the character of a dedication that, in some cases, so far as the dedicatory is concerned, a dedication will be deemed complete, while as to the public authorities there may not have been such an acceptance as would render them responsible for the repair and keeping of the premises dedicated. The acceptance may be either formal or by user. In some jurisdictions, the mere use of the premises by the people, is not regarded as an acceptance by

the public authority; whereas other states adopt an opposite view, and in still others the matter is settled by statutory enactment. It is, however, an undoubted general rule, that to be complete the dedication must be accepted: *San Francisco v. Calderwood*, 31 Cal. 585; *Niagara Falls Sus. Bridge Co. v. Bachman*, 66 N. Y. 261; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Parsons v. Atlanta University*, 44 Ga. 529; *White v. Smith*, 37 Mich. 291; *State v. Tucker*, 36 Iowa, 485; *Onstott v. Murray*, 22 Id. 457; *Cook v. Harris*, 61 N. Y. 448; *Stone v. Brooks*, 35 Cal. 489; *San Francisco v. Carnavan*, 42 Id. 541; *Kennedy v. Le Van*, 23 Minn. 513; *Derby v. Alling*, 40 Conn. 410; *Guthrie v. New Haven*, 31 Id. 308; *Carter v. City of Portland*, 4 Or. 339; *Sanford v. Meridian*, 52 Miss. 383; *Briel v. Natchez*, 48 Id. 423; *Summers v. State*, 51 Ind. 201; *Denver v. Clements*, 3 Col. 472; *Mayor of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. (1 Beas.) 563; *Trustees of Methodist E. Church v. Council of Hoboken*, 33 N. J. L. (4 Vr.) 22.

With respect to the character of the acceptance, the cases resolve themselves into two classes: 1. Those requiring an acceptance by competent authority; and, 2. Those acknowledging the sufficiency of an acceptance from mere user. The second class embraces by far the greater number of our courts; and they maintain that an acceptance may be shown by general public use, by appropriating the land for the use designed, or by the taking charge of and repairing the highway by the proper authorities: *State v. Tucker*, 36 Iowa, 485; *Onstott v. Murray*, 22 Id. 457; *Cook v. Harris*, 61 N. Y. 448; *Carter v. City of Portland*, 4 Or. 339; *Sanford v. Meridian*, 52 Miss. 383; *Briel v. Natchez*, 48 Id. 423; *Stone v. Brooks*, 35 Cal. 489; *San Francisco v. Carnavan*, 42 Id. 541; *School District v. Heath*, 6 Pac. C. L. J. 898; *Fisk v. Hanna*, 88 Ill. 209; *Fairfield v. Morey*, 44 Vt. 239; *Kennedy v. Le Van*, 23 Minn. 513; *Guthrie v. New Haven*, 31 Conn. 308; *Buchanan v. Curtis*, 25 Wis. 99. In Indiana, the court have not decided the question: *Munsur v. State*, 60 Ind. 357.

**ACCEPTANCE FROM USER.**—The question of what is sufficient evidence of the acceptance by the unorganized public, who can not as a whole, or by a majority, expressly accept, is one of some difficulty. There is also a distinction as to the weight of such evidence. Some of the cases which recognize it to be conclusive evidence of an acceptance for the public to use the premises for twenty years, the statutory period, do not accord such weight to a user for a shorter period: *Mauck v. State*, 66 Ind. 177; *Bartlett v. Bangor*, 67 Me. 460; *Daniels v. Chicago and N. W. R. R. Co.*, 41 Iowa, 129. User for such a length of time would entitle the public to adopt one of two courses—either to claim a permanent easement in the land, on the ground of a dedication, if the user was permissive: *Stevens v. Nashua*, 46 N. H. 199, or to set up a prescription where the user was adverse and under a claim of right: *State v. Tucker*, 36 Iowa; Wash. on Eas., 177; *Kyle v. Logan*, 87 Ill. 64; *Mauck v. State*, 66 Ind. 177; *Stevens v. Nashua*, 46 N. H. 192. But on the first proposition, as to the conclusiveness of a seemingly permissive user for the statutory time, upon the fact of a complete dedication, the courts are not harmonious. The general principle herein laid down, that an intention to dedicate is essential, is relied upon in many instances to show that an apparent permission of the user was really given under mistake: *State v. Crow*, 30 Iowa, 258. And some courts, notwithstanding such lengthy user, permit the owner to show any fact which would overcome the presumption: *Kyle v. Logan*, 87 Ill. 64. But there is no doubt, in all those cases which permit the evidence of user, at all, to prove an acceptance by the public, that an actual user for the period of the statute of limitations will be a sufficient acceptance

of a dedication. Many of the decisions confound the user sufficient to establish a dedication with that requisite to give a right by prescription. The distinction, however, is clear. The intention of the owner is the deciding element. Against his intention to devote the land to the use of the public, must be brought a continuous and adverse user for the period of limitation to give the public a permanent easement in his land, and that easement is a prescriptive right; whereas, if an intention to set aside the land to the public use be shown, a user on the part of the public is pursuant to the dedication, and will, in the great majority of states, be sufficient evidence of a complete acceptance and dedication, if continued for the statutory time; and in many cases user for less than that time is sufficient. And another important feature is, that although the statutory time may have elapsed, yet the claim of right under a dedication may be overthrown by disproving the intention to dedicate: *Kyle v. Logan*, 87 Ill. 64; whereas an adverse claim for that time would establish an incontrovertible right by prescription.

It is upon this latter branch of the subject, what evidence of acceptance is sufficient when the use has not continued for a period of time coeval with the statute of limitation, that the most delicate questions arise. A comprehensive summary of the facts of importance, as evidence to establish such acceptance, is given by Judge Butler in *Guthrie v. New Haven*, 31 Conn. 306, 321: "The whole matter, acceptance as well as dedication, has been left by a majority of the court to rest on the principles of the common law with which it originated. These principles authorize the gift, estop the giver from recalling it, and presume an acceptance by the public where it is shown to be of common convenience and necessity, and therefore beneficial to them. For the purpose of showing that it is beneficial, an express acceptance by the town or other corporation within whose limits it is situate and who are liable for its repair, the reparation of it by the officers of such corporation, or a tacit acquiescence in the open public use of it, is important; and so are the acts of individuals, such as giving it a name by which it becomes generally known, recognizing it upon maps and in directions, using it as a descriptive boundary in deeds of the adjoining land, or as a reference for locality in advertisements of property, etc., and any other acts which recognize its usefulness and tend to show an approval of the gifts by the members of the community immediately cognizant of it; but the principal evidence of its beneficial character will be the actual use of it as a highway without objection, by those who have occasion to use it for that purpose: *Green v. Town of Canaan*, 29 Conn. 157."

The beneficial nature of the use as here explained, is also relied upon in other decisions to determine the sufficiency of the use of lands dedicated to the public, to complete the dedication. Thus, in *San Francisco v. Carnahan*, 42 Cal. 541, the use is required to be of such duration that the public interest and private rights would be materially impaired if the dedication were revoked and the use discontinued by the public. And the same criterion is adopted by other courts: *Summers v. State*, 51 Ind. 201; *Boyce v. Kalbaugh*, 47 Md. 334; S. C., 28 Am. Rep. 464.

The acceptance of a bridge dedicated to public use was deemed conclusively evidenced by the acts of the road commissioners in repairing it, in directing travel to it, and in nailing a board across it when out of repair: *Dayton v. Rutland*, 60 Ill. 58; S. C., 84 Id. 279; S. C., 25 Am. Rep. 457. The erection of a school-house on lands donated for that purpose, concludes the dedication: *Carpenteria School District v. Heath*, 6 Pac. C. L. J. 898. Travel and recognition of a highway as such, is sufficient acceptance: *Fisk v. Havana*, 88 Ill.

208. Repairs made by public authorities on a street near the part in question, prove the acceptance, if the repairs were evidently made with a view to the use of the whole street: *Kennedy v. Le Van*, 23 Minn. 513. But where land is appropriated for a public park, evidence that the land has been used for agricultural fairs, and by traveling showmen, and by boys in ball-playing, is not sufficient: *Baker v. Johnston*, 21 Mich. 349.

**WHEN ACCEPTANCE TO BE MADE.**—A mere unaccepted offer to dedicate is of no effect: *Parsons v. Atlanta University*, 44 Ga. 529; and *infra*, where the subject of dedication according to maps is considered. But it is not necessary that the acceptance should be immediate. No particular length of time is essential to make a dedication valid and irrevocable. The dedication and acceptance may both concur on a single day; but all that is needed at the most is room for the estoppel to operate: *Cook v. Harris*, 61 N. Y. 448. But the general rule is, that the acceptance must be made within a reasonable time: *Id.*; *Briel v. Natchez*, 48 Miss. 423. The dedication may be made to take effect *in futuro*: *Denver v. Clements*, 3 Col. 472; *Police Jury v. Foulhouze*, 30 La. Ann. 64; *M. E. Church v. Hoboken*, 33 N. J. L. (4 Vr.) 22; *Mayor of Jersey City v. Morris Canal & B. Co.*, 12 N. J. Eq. (1 Beas.) 563; *Derby v. Alling*, 40 Conn. 410. The very nature of many dedications presupposes the fact that the public will not, can not, accept immediately; and it is sufficient if the land is accepted when the public convenience requires: *Hardy v. Memphis*, 10 Heisk. 127, a dedication of land for wharfage purposes; *Carter v. Portland*, 4 Or. 339, where land was donated for a public square. Nor is there any significance in the fact that the whole of the tract is not in actual use; it is sufficient that the public has a right to the use: *Police Jury v. Foulhouze*, 30 La. Ann. 64. Of course an acceptance can not be made before the dedication: *San Francisco v. Calderwood*, 31 Cal. 585.

**FORMAL ACCEPTANCE.**—The decisions making a formal acceptance by public authorities necessary for a complete dedication, have arisen uniformly in the case of highways. And these adjudications have viewed the subject from the town's or district's point of view; that is, whether or not such body would be liable to make repairs if no positive acceptance by that body be proved, and have decided that it would not: *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332, 340; *Mayberry v. Inhabitants of Standish*, 56 Me. 342; *Commonwealth v. Kelly*, 8 Gratt. 632. For the most part statutes have settled the matter directing what acts make a road public, and when a duty to *repair* the same rests on any particular body; but even in the states from which the decisions above are cited, it would not be pretended that land might not be dedicated, so far as the owner is concerned, although no duty to repair would rest on the public authorities. For, as will be shown in the subsequent consideration of dedications by maps, estoppels in favor of the public will arise where the municipal authorities have done nothing at all. What amounts to formal acceptance is not definitely settled. Even in Virginia, where the reasoning hereafter to be alluded to is employed against the generally prevailing doctrine, the court hold that the formal proceedings by the road law need not be carried out to make the county liable on a dedicated road: *Kelly's case*, 8 Gratt. 636. In this decision the court combat the general principle upon the sufficiency of a user, and contending that the acceptance of a dedication should be by some public body, ask: "Is the mere passing over the road by individuals an acceptance? If so, what number of persons passing over it will amount to an acceptance—ten, fifteen, twenty, or what number?"

**NO GRANTEE OF THE USE OR EASEMENT IN BRING** is necessary to receive



the dedication: *Beatty v. Kurtz*, 2 Pet. 566; *Cincinnati v. White*, 6 Id. 431; *Mayor of Jersey City v. Morris Canal and Banking Co.*, 12 N. J. Eq. (1 Beas.) 563; *Dubuque v. Maloney*, 9 Iowa, 450; *Kelsey v. King*, 33 How. Pr. 39; *Town of Pawlet v. Clark*, 9 Cranch, 292; *McConnell v. Lexington*, 12 Wheat. 582; *Carter v. City of Portland*, 4 Or. 339; *Bryant v. McCandless*, 7 Ohio, 135; *New Orleans v. United States*, 10 Pet. 662; *Carpenteria School District v. Heath*, 6 Pac. C. L. J. 898. It is not essential that the right of use should be vested in a corporate body, it may exist in the public at large. It is true that an intention to donate is the distinctive feature of a dedication, but where the intention is once manifested, it is not so essential that there should be a person or body of persons ready immediately to take the gift; the gift is irrevocable where third persons, individuals, have acted on the faith of the dedication, thereby creating an estoppel *in pais*. A parol dedication is sometimes defined an estoppel *in pais*: *Carter v. City of Portland*, 4 Or. 339. The acts of the individuals, in relying on the dedication, is tantamount to an acceptance, so that the general rule of an acceptance being necessary, is not violated. And the rights which these individuals have acquired under the dedication inure to the benefit of the public at large for whose use it was originally designed: *Carter v. City of Portland*, *supra*, and cases cited. For example, if at the time of the dedication the town or city has no corporate existence, the right to use the streets dedicated vests in the corporation as soon as created: *Waugh v. Leach*, 28 Ill. 488; *Briel v. Natchez*, 48 Miss. 423. In many of the earlier cases objection was made that a dedication was but a grant, and to be valid required a grantee in being, but the objection did not prevail with the courts, as seen by the cases above.

**LEGAL TITLE NEED NOT PASS FROM THE DEDICATOR.**—Proceeding on the assumption that a dedication was nothing but a grant, some of the first decisions on this subject seemed to warrant that the legal title passed from the dedicator to the public. It has also been held that the legal title passed to the individual grantees of the lots abutting on the lands dedicated: *Bayard v. Hargrave*, 45 Ga. 342; *City of Des Moines v. Hall*, 24 Iowa, 234, subject to the public easement. But it is not necessary that the legal title should pass from the owner to constitute a valid dedication: *New Orleans v. United States*, 10 Pet. 712; *Carpenteria School District v. Heath*, 6 Pac. C. L. J. 898. Statutes, however, have worked a change in this as in other branches of the subject, and have altered the common law doctrine that the adjoining proprietors own the soil of the street subject to the public easement: *City of Des Moines v. Hall*, 24 Iowa, 234. Says Washburn on Easements, sec. 137: "It is not necessary, in order to effectuate a dedication, that the owner of the land dedicated should part with the fee of the same. Nor is it inconsistent with an effectual dedication, that the owner should continue to make any and all uses of the same which do not interfere with the uses for which it is dedicated." To the same effect: *Bartlett v. Bangor*, 67 Me. 460.

**PARTIAL DEDICATIONS.**—As to the mode or time of user, a dedication may undoubtedly be partial: *Mowry v. Providence*, 10 R. I. 52. But it was contended in that case that a dedication, although valid if partial in the manner indicated, would be invalid if limited to a portion of the public, as to the people of a specified town. The court, however, refused to entertain the objection, and referred to the rulings of the United States, which had in many instances recognized dedications for charitable purposes, for burial grounds, and the like, to the people of a certain town.

**DEDICATION ACCORDING TO A MAP OR PLAT.**—Owners of land often sell the same or portions thereof according to a map or plat of the land, on which

are laid out streets, squares, and other features of a town. Selling lots according to such a map, whether recorded or not, and bounding them on the streets and squares, operates as an irrevocable dedication of the streets and squares to the public use: *Cincinnati v. White*, 6 Pet. 431, a leading case; *Clark v. City of Elizabeth*, 40 N. J. L. (11 Vr.) 172; *Price v. Inhabitants of Plainfield*, Id. 608; *Denver v. Clements*, 3 Col. 472; *Re Brooklyn North Thirteenth Street*, 73 N. Y. 179; *Bridges v. Wyckoff*, 67 Id. 130; *Bartlett v. Bangor*, 67 Me. 460; *Pierpoint v. Town of Harrisville*, 9 W. Va. 215; *Lockland v. Smiley*, 26 Ohio St. 94; *Carter v. City of Portland*, 4 Or. 339; *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248; *Huber v. Gazley*, 18 Ohio, 18; *Logansport v. Dunn*, 8 Ind. 378; *Shanklin v. Evansville*, 55 Ind. 240; *Town of Derby v. Alling*, 40 Conn. 410; *Preston v. City of Navasota*, 34 Tex. 684; *Oswald v. Grenet*, 22 Id. 94; *Rowan's Ex'r v. Portland*, 8 B. Mon. 232, a leading case; *Augusta v. Perkins*, Id. 207; *Newport v. Taylor*, 16 Id. 699; *Hannibal v. Draper*, 15 Mo. 634; *Schenley v. Commonwealth*, 36 Pa. St. 62; *Dubuque v. Maloney*, 9 Iowa, 450; *City of Des Moines v. Hall*, 24 Id. 234; *Winona v. Huff*, 11 Minn. 119; *Stone v. Brooks*, 35 Cal. 489; *Hoadley v. San Francisco*, 50 Id. 265; *Harding v. Jasper*, 14 Id. 642; *Grogan v. Hayward*, 6 Pac. C. L. J. 35, Ninth Cir. Dist. of Cal., per Judge Field. It makes no difference whether the dedication is by one who originally lays out a new town or by one who newly subdivides a portion of an old town: *Stone v. Brooks*, 35 Cal. 489. The mere survey of the land into lots and blocks, without a sale, is no dedication: *United States v. Chicago*, 7 How. 185; *Carter v. City of Portland*, 4 Or. 339. Nor would the mere laying out of a town upon a man's own land and by his own private act, and the making and recording of a plan of the town, conclude him in any respect, in the absence of statutes: *Grogan v. Hayward*, *supra*; *Rowan v. City of Portland*, 8 B. Mon. 232, a decision so elaborate and able that the supreme court of the United States, in *Morgan v. Railroad*, 96 U. S. 716, contents itself with referring to it without discussing the general subject. A late case in New Jersey, demands still more to make the estoppel from mapping and selling perfect. It is there ruled, that not only must there be a sale, but it must be an effective sale, made so by a conveyance: *Vanata v. Jones*, 42 N. J. L. 641.

Purchasers of lots according to a plan acquire an interest in all the streets marked thereon: *Bartlett v. Bangor*, 67 Me. 460. The dedication of the streets is an entire thing: *Town of Derby v. Alling*, 40 Conn. 410; *Grogan v. Hayward*, 6 Pac. C. L. J. 351. For of such a purchase, part of the consideration is that the streets and public grounds marked on the plat shall be open, not only to the purchaser, but to all subsequent purchasers: *Grogan v. Hayward*; and the town in its corporate capacity may insist upon every right which any of its inhabitants may have acquired by virtue of the original dedication: *Carter v. City of Portland*, 4 Or. 339. As the acts of third persons have made the estoppel as to the dedicator perfect, and rendered it incompetent for him to revoke, therefore the town may, from time to time, subject the land to the uses intended, as the growth of the place may demand: *Grogan v. Hayward*, 6 Pac. C. L. J. 351; *Bartlett v. Bangor*, 67 Me. 460. These uses must be ascertained exclusively from the plat, and can not be enlarged or diminished by the parol construction of those who made it, or of the public claiming under it: *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248; *Preston v. City of Navasota*, 34 Tex. 684.

"A proprietor, laying off an addition to an incorporated town or city, can not confer upon some other public corporation rights in and control over the streets and alleys, and such other corporation has no authority to accept a

grant foreign to its powers and duties. To recognize such a doctrine would be to deprive the city or town of the usual and necessary control of its own streets, and to give this control to a foreign or extraneous corporation. These principles are well sustained by adjudged cases: *Jackson v. Hartwell*, 8 Johns. 422; *Id.* 385; *Trustees v. Peaslee*, 15 N. H. 317; *Morris v. Bowers*, Wright (Ohio), 157; *Sloan v. McConahay*, 4 Ohio, 157; *Hornbeck v. Westbrook*, 9 Johns. 73; *North Hempstead v. Hempstead*, 2 Wend. 109; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *City of Des Moines v. Hall*, 24 Iowa, 234.

**ADVERSE OCCUPATION OF DEDICATED LANDS.**—No one can acquire by adverse occupation the right, as against the public, to obstruct a street dedicated to the public use, and thus prevent the use of it as a public highway: *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Id. 437, where one of the streets along the city front had been used for the piling of lumber for more than the statutory time. The same rule was applied to a public park in *Price v. Plainfield*, 40 N. J. L. 608, and to a public square in *Hoadley v. San Francisco*, where the court, admitting that there was adversity of opinion, supported its decision by referring to *Commonwealth v. Alberger*, 1 Whart. 486; *Rung v. Shoenberger*, 2 Watts, 23; *Commonwealth v. McDonald*, 16 Serg. & R. 395; *Baxter v. Commonwealth*, 3 Penn. 253; *Penny Pot Landing case*, 16 Pa. St. 94; *Jersey City v. Morris Canal and B. Co.*, N. J. Eq. (1 Beas.) 227; *Jersey City v. City*, N. J. (1 Vr.) 521. On the other hand the adverse occupation and use, so open, notorious, and hostile as to compel the city to interpose to save its right, may ripen into a title by prescription in favor of an individual: *Briel v. Natchez*, 48 Miss. 423; *Wash. on Eas.*, sec. 157. But it is not enough to put the soil of the street to some private use, while the *locus in quo* was not needed for the public use: *Id.*; *Bartlett v. Bangor*, 67 Me. 460.

**CHANGING THE USE.**—Where property dedicated is put to a use other than that authorized by the terms of the dedication, then the dedicator or any lot holder of the city may proceed in equity to enforce the proper use: *Hurdy v. Memphis*, 10 Heisk. 127; *Carter v. City of Portland*, 4 Or. 339, citing *Barclay v. Howell's Lessee*, 6 Pet. 498; *Williams v. The Church*, 1 Ohio St. 478; *Webb v. Moler*, 8 Ohio, 552; *Board etc. v. Edson*, 18 Ohio St. 221; *Harris v. Elliot*, 10 Pet. 25; *County v. Newport*, 12 B. Mon. 533. In case of a dedication according to a plat, the uses must be determined by reference to the plat, and can not be enlarged by parol construction: *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248. But this rule as to the manner of using must be taken with the limitation that the land may be devoted to such uses as are consistent with or necessary to the principal use; as to the construction of drains and sewers and laying of water pipes, gas pipes, etc., in the streets: *Warren v. Grand Haven*, 30 Mich. 24; *Bayard v. Hargrove*, 45 Ga. 342. But the erection of a water tank in a public street, is not a proper user: *City of Morrison v. Hinkson*, 87 Ill. 587; S. C., 29 Am. Rep. 77. Nor can a city run streets through parks: *Price v. Thompson*, 48 Mo. 361; or erect buildings therein: *Rutherford v. Taylor*, 38 Id. 315; or divert a square for uses foreign to the dedication: *Warren v. Mayor of Lyons City*, 22 Iowa, 351. Nor can a city dispose of lands dedicated to public use: *Dill. on Munic. Corp.*, sec. 512; *Police Jury v. Foulhouze*, 30 La. Ann. 64.

**REVOKING AND REVERTER.**—Before a dedication is accepted, it may be revoked: *San Francisco v. Carnavan*, 42 Cal. 541; *Bridges v. Wyckoff*, 67 N. Y. 130. Of course this principle must be taken with the qualification that third persons have not acquired rights, with respect to such dedication, as would estop the dedicator, as hereinbefore explained. But when once accepted, the dedication becomes irrevocable: *Wash. on Eas.*, sec. 139. Nor

will it revert to the dedicator except when the use becomes impossible: *Dill. on Munic. Corp.*, sec. 515. The non-user for such a length of time as would raise a presumption of abandonment, might entitle the owner to resume; or where lands were dedicated for certain public buildings which were erected elsewhere: *Wash. on Eas.*, sec. 146; *Prince v. McCoy*, 40 Iowa, 533. The reservation of a right to revoke and to devote the land to some other use is not a good dedication: *San Francisco v. Carnavan*, 42 Cal. 541.

## TUBBS v. RICHARDSON.

[6 VERMONT, 442].

**IF A CO-TENANT OF A CHATTEL DESTROY IT**, it is a conversion for which trespass or trover will lie.

**THE SALE OF LESS THAN THE WHOLE OF A CHATTEL** by a tenant in common is not a conversion; whether the sale of the whole is, *quære*.

**TROVER.** The defendant and another, being tenants in common of the wool of certain sheep owned by them, the latter sold his interest to the plaintiff. The defendant, knowing this, nevertheless sheared the sheep, and sold twenty-eight pounds out of the sixty-eight pounds realized, and carried the balance to his house, refusing to deliver to the plaintiff his share, but claiming them as his own. Verdict for the plaintiff. Exceptions were taken and allowed.

*J. L. Buck*, for the plaintiff.

*Miller, and Smith and Peck*, *contra*.

By Court, MATTOCKS, J. From the exceptions in the case two questions arise: 1. Whether the wool sued for was the property of the plaintiff? If it was, has there been a conversion by the defendant? We will consider the second question, first assuming that Bosworth owned one half of the unsheared wool, and sold it to the plaintiff. Then the plaintiff and defendant were tenants in common of the whole, before and after it was clipped.

Then were the acts done by the defendant, to wit, shearing the whole, selling twenty-eight out of sixty-eight pounds, carrying the balance to his own house, refusing, on demand, to deliver any part of it to plaintiff, and claiming the whole as his own, a conversion in law. The general rule as laid down by *Co. Lit.*, 200; *Brown v. Hedges*, 1 Salk. 289. In *Fox v. Hamby*,<sup>1</sup> 2 Cowp. 140, and in *Holliday v. Camself and White*, 1 T. R. 658, that an action of trover will not lie in favor of one tenant in common against another; and in none of these authorities save *Co. Lit.* is the proposition qualified by an exception of

1. *Fox v. Hambury*, Cowp. 445.

where there has been a destruction of the property by the defendant: But there are numerous modern authorities that say a destruction of the property is a conversion. Of this, therefore, there is no doubt. But the inquiry now is, what other acts, if any beside the destruction of property, will be evidence of the conversion?

The authorities cited and relied upon by the plaintiff will be noticed: 3 Stark. 1496, and notes—the text says, that when an action is brought by one tenant in common of an indivisible chattel against another tenant in common, it is not sufficient to show that the defendant took forcible possession of the chattel and carried it away, or that he changed the form of the chattel by applying it to the use for which it was not intended. But if the defendant, being tenant in common, destroy the chattel, it is a conversion, and trespass or trover will lie; and with one example to illustrate the principle, this is all that is said in the notes. Bull. N. P. 35 is cited, which is, that when the possession of a tenant in common becomes tortious, the co-tenant may maintain trover. On examining Buller, the authority there quoted is 2 Salk., MS., and is this: "That if A. be tenant in fee of one fourth part of an estate, and B. be tenant in common with him of the other three parts, for a term of years, without impeachment of waste—if A. cut down any trees, and B. take them away, A. may maintain trover—for though B., being not chargeable of waste, might cut down what trees he would, yet trees having an inheritable property, and he having no interest in the inheritance, can not take them when felled by him who has the inheritance, and consequently, his possession being tortious, can not be said to be the possession of the other." Also *Heath v. Hubbard*, 4 East, 110, where the court intimated an opinion, that the mere sale of the whole chattel by a co-tenant in common would not amount to a conversion. But in *Barlow v. Williams*, 5 B. & A. 395,<sup>1</sup> great doubt seems to have been entertained upon the question, whether the sale of the whole by a mere tenant in common, would not amount to a conversion; and Abbott, C. J., and Bailey, J., seem to have been of the opinion, that it would; and in *Wilson et al. v. Reed*, 3 Johns. 174, it was decided that if one tenant in common of a chattel sell it, an action of trover will lie against him by his co-tenant. In *Cowan v. Buyers*, Cooke, 53 [5 Am. Dec. 668], it was held that if one tenant in common does acts inconsistent with the nature of the co-tenancy, and which in the common course of things

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1. *Barton v. Williams*, 5 Barn. & Ald. 396.

will destroy the other's interest in the property, the latter may maintain trover against the former. See also the observations of Chipman, C. J., in *Vickery v. Tafts*, 1 Chip. 241. So much of the law on this subject is collected by Starkie and his American editor, Metcalf.

In the case from Chipman it was decided that the parties were not tenants in common of the boards there in question, and therefore the question now before us was not decided; but the chief justice intimates an opinion upon two supposed cases, first, when goods owned in partnership were intended for sale, which one partner may lawfully sell, the other, where personal property is kept by partners for profit in the use only, as machinery in a factory, which for one to sell would be a tort. Neither of these cases is like the one at bar. In the case of *Ladd v. Hill*, 4 Vt. 164, it was decided that the destruction by one, of a note owned by two, was a conversion, and also that it was a conversion in a creditor to attach and sell a yoke of oxen owned by two as tenants in common on a demand against one. It is believed these are all the cases cited by plaintiff, and are probably the most in his favor that are to be found, and from them it seems that the most they show as to a sale being a conversion, is that until lately at least, strong doubts have existed, whether the sale of the whole chattel, owned in common by one tenant is a conversion; but that the weight of authorities now is, that it is. But no intimation has been thrown out by any judge or elementary writer, that the sale of less than the whole is such conversion. Then as it respects a tortious possession, the case itself in Buller's N. P. shows it entirely unlike this or any common sale. Indeed there was no sale, but the tenant who cut the trees, and the tenant for a term of years, who neither owned the soil nor the trees, took them away, and although he might have cut without impeachment of waste, yet that could give him no right in common to the several trees, with him who owned an undivided portion of the land in fee. As to the case from Coke, we have not the case, but it is easy to see that what "will in the common course of things destroy the other's interest in the property," may be considered as tantamount to a destruction of the property. A case or two will be noticed, which have been cited for the defendant: *Fellows v. Lord Greenville*,<sup>1</sup> 1 Taunt. 241, was, that plaintiff and defendant became tenants in common of a whale at sea; the defendant extracted the oil and other valuable matter from the

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1. *Fennings v. Lord Grenville*.

whole whale, but rendered no part to plaintiff. The court decided that trover would not lie, and Mansfield, J., says, that it is admitted that the taking by the defendant and his refusal to deliver, is no conversion in a tenant in common and gives no right of action, that the parties were tenants in common of the oil as before of the whale; and Chambers, J., says, there are cases which establish, that one tenant in common can not recover in trover without first proving a destruction of the property or something equivalent to it; and again, that there are many older cases than those that have been cited, but there are none in which an action has been maintained without proof of a destruction.

In — v. *Sage*,<sup>1</sup> 7 Conn. 95, it was decided: 1. That the sale of one tenant in common of his interest, makes the purchaser and the other, tenants in common of the whole; and, 2. That nothing done by one tenant in common of a chattel, short of a destruction of it, will render him liable to his co-tenant in tort; and Judge Daggett says, this is familiar law; and Swift Dig. 170 is to the same effect. Upon principle it would seem to depend upon the kind of property and the use that the parties intend to make of it, whether a sale of the whole by one party would be lawful or not, independent of partners in trade. Take the case of two farmers owning a flock of sheep in common; when the wool was sheared, as there is no law to compel a partition or division where they do not agree, and its quantity as well as quality is to be regarded, it might be reasonable to hold it no tort if one sold the whole, and made himself accountable to his co-tenant, in account, or money had and received. In the case of tenants in common of a horse or other indivisible property, still greater difficulties might occur where one wished to keep and the other to sell. Yet there may be greater inconveniences to hold to the contrary; and we should probably yield to the late authorities on this point; but to go farther without authority, or any stronger reason of sound policy than has yet appeared, would not be proper. Applying these principles to the facts in the case, there is no evidence of destruction; for aught appears, the whole of the wool yet remains wool; selling a part and carrying the remainder to defendant's house was no destruction of it. There was no sale save of twenty-eight pounds, which was less than half, and all the cases of sale go expressly on the ground of the sale of the whole, and there is no pretense that the defendant's possession

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1. *Ovatt v. Sage*.

was tortious, as the whole sheep were the defendant's property, were in his possession and sheared by his tenant, and the not delivering the wool on demand and claiming it as his own, is nowhere called a conversion.

Judge Swift (Dig., vol. 1, 170) says, either may sell his share or part of such chattel, and the purchaser would be tenant in common with the others. One can not sell the whole, and if he should attempt to do it the others might affirm the sale, and demand their proportion of the money or dissent to it and become tenant in common of the chattel with the purchaser. The defendant has therefore not in law been guilty of a conversion of the property in question. It is a very inconvenient mode of owning personal property, to be tenants in common, but this by our law comes by purchase and not by descent, and the parties must be content with what remedies the law has provided, however inadequate those may appear to be. As the decision upon this point probably puts an end to the case, it is of no importance to decide the other.

Judgment of county court is reversed.

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DESTRUCTION OF THE COMMON CHATTEL BY A CO-TENANT is a conversion for which trover will lie: *Farr v. Smith*, 24 Am. Dec. 162; *Lucas v. Wasson*, Id. 266; *Hyde v. Stone*, 22 Id. 582; *Gilbert v. Dickerson*, Id. 592 and note; *Sheldon v. Skinner*, 21 Id. 161; *Hyde v. Stone*, 18 Id. 501 and note.

FOR A DISPOSSESSION OF A CHATTEL BY A CO-TENANT, trover will not lie: *Farr v. Smith*, 24 Am. Dec. 162; *Hyde v. Stone*, 18 Id. 501 and note.

SALE OF COMMON CHATTEL BY A CO-TENANT will support trover: *Mumford v. McKay*, 24 Am. Dec. 34 and note; *Farr v. Smith*, *supra*; *Gilbert v. Dickerson*, 22 Am. Dec. 592 and note; *Hyde v. Stone*, 18 Id. 501 and note.

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## COLBY v. REYNOLDS.

[6 VERMONT, 489.]

WORDS WRITTEN AND PUBLISHED MAY BE LIBELOUS, which if spoken would not be actionable.

A PUBLICATION RENDERING A PERSON RIDICULOUS, or exposing him to contempt, or impairing his standing in society, as a man of rectitude and principle, is libelous.

TO CHARGE ONE IN WRITING WITH BEING THE AUTHOR OF A FALSE AND MALICIOUS REPORT, is libelous.

LIBEL, charging the defendant with publishing in a newspaper a statement that the plaintiff was one of the authors of a false and malicious report respecting the defendant. Verdict for the plaintiff. Motion in arrest being overruled, exceptions were taken.



*O. H. Smith and Merrill, for the defendant.*

*Upham and Keith, contra.*

By Court, WILLIAMS, C. J. This is an action for libel. It is stated that the defendant published in one of the papers, published in this town, a communication which the plaintiff contends is libelous. The jury have returned a verdict for the plaintiff: they must have found that the publication was made by the defendant—that the innuendoes were true—that it was made with an intent to injure the plaintiff, or in other words, that it was malicious, and that it was false. This also may have involved the truth or falsity of the report in relation to the defendant, which was the subject of the publication. Inasmuch as the defendant in the publication, stated that a false report about him was in circulation, and put in circulation by the plaintiff, it was competent for him on the trial, to show that the report was false, as well as that the defendant was the author; and in that case, his justification would be complete. On the other hand, the plaintiff might prove that the report in circulation was true, or that he was not the author.

The defendant, after a verdict against him, has moved in arrest for the insufficiency of the declaration; and the question, and the only question, which has now been made is, whether the publication is libelous. It is to be observed, that the declaration charges the defendant with having published a libel or written slander. A distinction has long been known and recognized between verbal and written slander. Words, when committed to writing and published, are considered as libelous, which if only spoken, would not subject the person speaking to any action. Perhaps it is to be regretted that a distinction was ever made between oral and written slander; and if it was a new question, no distinction would now be made. The reasons which have been given for the distinction, have been questioned both by writers and judges of eminence. It has been made, however, and has become part of the law, and as such we must receive it. There can be no question, but that a slander written and published, evinces a more deliberate intention to injure, is calculated more extensively to circulate the accusation, and to provoke the person accused to take the means of redress into his own hands, and thus to commit a breach of the peace, than mere oral slander which is spoken and soon forgotten. The report in circulation in relation to the defendant, while it was a mere report, was confined to the neighborhood, and could not have

been very extensively known. Whereas, had it been published, as was the slander of which the plaintiff complains, it would have been known to ever reader of the paper, and have circulated as extensively as the paper circulated, and have excited the curiosity of many who never had heard of the parties before.

Words spoken must impute some crime so as to endanger the person to whom they relate, or they must impute to him something which would tend to exclude him from society, and lead one to avoid him. But a publication which renders the person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view—which tends to impair his standing in society, as a man of rectitude and principle, or unfit for the society and intercourse of honorable and honest men, is considered as a libel. The rule has been laid down by an eminent writer, and one who has endeavored to draw his principles from decided cases—"That any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts by exposing him to disgrace or ridicule, are actionable without proof of special damage. In short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the situation of the party in society for the worse:" Stark. on Slander, 140. This rule is probably not more extensive than a due regard to justice requires.

It remains to be considered, whether the publication here complained of comes within the definition; and without making any comparison between this and the numerous cases which have been decided, we can learn its true nature and tendency from the publication itself; and we can, by reading it, discern whether or no the tendency of it was to impute to the plaintiff either a want of moral rectitude, or to accuse him of a bad action and vicious principle, to hold him up as a dishonest, dishonorable, and mischievous member of society, and one who ought to be avoided by honest and honorable men. The publication in the first place charges, that a report was in circulation highly injurious to the character and standing of the defendant as a member of society, and particularly as a member of the religious community with whom he was

connected, and which, if not true, was a gross, scurrilous, and indecent slander on the defendant. Second, that the report was false, and not only false, but done with a view to injure the defendant, implying that the report was fabricated and put in circulation with a malignant design. The defendant, no doubt, intended that it should be so understood. No one could possibly have supposed by this, that the writer intended that the false report was fabricated by some one, and another had put it in circulation innocently; but it was undoubtedly intended to express or cause it to be believed that the author of the false report had given it circulation with an intent to injure; and that there might be no mistake as to the individual who thus put this false report in circulation, the plaintiff is directly charged with having put this false report in circulation, and by inference as the author and fabricator of the false and scurrilous charge.

If the defendant had contented himself with stating the report and then denying it, and by imputing improper motives to the person who put the report in circulation, without charging the plaintiff as the author, he would have been justified and would have come within the principle laid down by the court in *Steele v. Southwick*, in their remarks upon the second count in the declaration: 9 Johns. 214. But when he published that a false report was put in circulation, and put in circulation with a design to injure him, and that the plaintiff put the report in circulation, what other conclusion can we draw, than that he meant to charge the plaintiff with having with a mischievous intent, and with the malice of the common slanderer, published and put in circulation a false and slanderous report of and concerning defendant? And can any one say that the tendency of this charge was not to impute most vile and dishonorable conduct to the plaintiff—to impute to him both a bad action and vicious principle—to impute to him a want of moral principle and cause him to be shunned by every honest and honorable man, as a common calumniator? Surely, no one would be disposed to associate with a man who could thus calumniate his neighbors and put in circulation a report so scurrilous and so defamatory. The necessary tendency of such an accusation was to injure the situation and station of plaintiff in society; and according to the principles laid down in the adjudged cases, it must be considered as a libel, and even the ingenuity which in former times was exercised, to give to words the mildest interpretation, could not by any forced and unnatural

construction of the publication, treat this publication as wholly innocent, and not imputing anything to the plaintiff injurious or scandalous.

The judgment of the county court must therefore be affirmed.

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### SHAW v. CLARK.

[6 VERMONT, 507.]

WHERE A JUDGMENT DEBTOR FURNISHES MONEY to a third person to buy up the judgment, and he does so, the creditor not knowing the facts, it amounts to a part payment only.

PAYMENT OF PART OF A DEBT BY A DEBTOR does not satisfy the whole, even if so received by the creditor.

DEBT on a judgment. Pleas. Payment, and sale of judgment to one Weeks, who discharged the defendant therefrom. Evidence was introduced to show that the money with which Weeks bought the judgment was furnished by Clark, and that he acted as Clark's agent. The court charged the jury that if they believed this to be the fact and that it was unknown to the judgment creditor, their verdict should be for the plaintiff. Verdict for plaintiff. Exceptions were filed.

*Cahoon*, for the defendant.

*Fletcher*, *contra*.

By Court, COLLAMER, J. The first question is, was the furnishing the money by the debtor, and procuring therewith a purchase of his debt, in the name and by the agency of a third person, such a fraud on the creditor as rendered the sale void? Without taking much time with this question, it at least is obvious that when a debtor furnishes the funds to a third person in his own name, to buy up the debts at a discount, it is so far fraudulent as would render the sale voidable, if the creditor chose to avoid it, as he did in this case, and offered to return the money.

This is not, however, the view on which we place this case. As the sum paid was really the money of the debtor, and paid over by his agent, it is the same as if paid by himself. This presents the main question in the case, to wit: is a payment of a part of a debt then due by the debtor, any satisfaction of the whole, even if so received by the creditor? This question is to be decided unembarrassed with any question of estoppel or technical release. This question has been long and repeatedly

and fully decided: See Chit. on Con. 277, 287, and the authorities there collected. This is otherwise, if the money was paid before the debt was due, or if paid by a third person out of his own money; for it would be a fraud on such third person for the creditor to collect the whole debt. So too is the case of receiving part in full satisfaction on a composition deed. The case, *Lewis v. Jones*, 4 Barn. & Cress. 506, cited by the defendant, is precisely on this ground. The security taken for the balance was a fraud on others. A *dictum* is found from Hobroyd, J., 2 Barn. & Cress., transcribed into 2 Sandf. Pl. & Ev. 233, that under certain circumstances the balance might be holden a gift to the debtor. This, if law, could not apply to this case, for the creditor was kept in ignorance that the debt was to be given up to the defendant.

Judgment affirmed.

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PAYMENT OF LESS THAN IS OWING is no satisfaction without a release of the debt: *Geiser v. Kershner*, 23 Am. Dec. 566 and note; *Russell v. Lytle*, 22 Id. 537; *Harrison v. Close*, 3 Id. 444.

AGREEMENT TO ACCEPT LESS THAN IS DUE IS NUDUM PACTUM: *Geiser v. Kershner*, 23 Am. Dec. 566 and note; *Seymour v. Minturn*, 8 Id. 390.

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## NOYES v. EVANS.

[6 VERMONT, 628.]

A PLEA OF RES ADJUDICATA is insufficient, unless it appears that the matters stated in the complaint and alleged to have been unavailingly set up as a defense in a former action, were positively decided in such former action against the present plaintiff.

DECLARATION on the case, stating that the plaintiff being induced by the defendant's promise to receive bank bills in payment of plaintiff's promissory note, executed his note to the defendant, but that he refused to receive such bills when tendered at the maturity of such note, and the plaintiff was obliged to pay the amount of said note to one to whom the defendant had indorsed it. Plea, general issue, and in bar, that the tender to defendant according to the agreement was pleaded in bar to the action by the indorsee, but judgment therein was rendered for the indorsee. The plea in bar in the present action was pronounced insufficient, and verdict and judgment were rendered for the plaintiff.

*Paddock*, for the defendant.

*Sawyer and Cushman*, contra.

By Court, COLLAMER, J. No exception was taken on trial to the parol evidence with which this declaration must, from its nature, have probably been sustained; no demurrer has been filed to this declaration, or motion in arrest for its insufficiency, and the court are not called on to decide on the well-known rule of evidence, in law, that the written contract finally executed between the parties, is the consummation of the transaction, and furnishes more conclusive evidence of the previous or cotemporaneous contract, than any parol testimony can; and forbids and excludes any parol evidence of anything different from, or inconsistent therewith. This is, however, a rule of evidence which the party may waive. The whole question now rises on the plea in bar. The defendant insists, that the plea in bar shows that the matter in the plaintiff's declaration was fully adjudicated and settled, in the suit on the note. Treating the former suit as between the parties, what is the plaintiff's claim? He insists, that he gave, understandingly, a note which was a legal, binding, obligatory note, according to its tenor, and was so intended by the parties; but there was another substantive, cotemporaneous, independent contract, by which Evans agreed to receive the amount in bank bills, at Hyde Park, which he did not do, but sold and collected the note.

The plea alleges that Noyes pleaded this in bar, to the suit on the note, and the court adjudged that the plaintiff, in that suit, ought not to be barred. The plea does not show that the justice found the facts stated in the plea were not proved, and therefore rendered judgment that the plaintiff should not be barred. If the judgment in that case can be legally accounted for, and yet the facts stated in the plea have been fully proved, then it is not *res adjudicata*; it would be merely a judgment that the facts did not amount to a bar. The result might have been produced by the parol testimony, in variation of the note being rejected by the justice; or he might have legally decided that the facts in the plea merely amounted to an accord with tender of satisfaction, which was no defense to the note, though, if on good consideration, it might sustain a separate suit; and so have rendered judgment that the plaintiff should recover, though the plea was fully proved, *non obstante veredicto*. That judgment is therefore no bar to this claim any more than if Noyes had pleaded in bar to that suit any debt or claim he had against Evans, and it had been adjudged no bar, would have been a defense to such claim afterwards. This is no way inconsistent with the case *Barney v. Bliss*, 2 Aik. 60. In that

case the defense went on the ground that there was but one contract between the parties, and sought to set aside the note. In this case, the plaintiff's declaration, and his former plea in bar, both set up a collateral contract, and leave both as subsisting contracts; for the agreement for payment in bills is not such a contract as Evans could have sustained action upon, and therefore was no substitution for the note, but independent.

Judgment affirmed.

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PLEA OF RES ADJUDICATA.—See *Lawrence v. Hunt*, 25 Am. Dec. 539 and note; *Holmes v. Broughton*, Id. 536; *Bridge v. Gray*, Id. 358; *Donnell v. Thompson*, Id. 216; *Carson v. Clark*, Id. 79; *Dixon v. Sinclair*, 24 Id. 615 and note, wherein other cases on this subject, found in earlier volumes of this series, are collected.

C A S E S  
IN THE  
COURT OF APPEALS  
OF  
VIRGINIA.

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POORE v. PRICE.

[5 LEIGH, 52.]

**RELEASE OF MORTGAGE PROCURED BY FRAUD AND MISREPRESENTATION will be vacated in equity, the mortgage lien restored, and the property decreed to be sold for the payment of the mortgages.**

**FRAUD, CONCURRENT JURISDICTION IN CASES OF, EXISTS AT LAW AND IN EQUITY, and the latter will not refuse to act, merely because there is also a remedy at the former.**

BILL in equity, by Poore against Price, from which, and the proofs in the case, it appeared that the plaintiff formerly held a mortgage on certain realty in Richmond, executed by one Barrett; that Price was desirous of obtaining this realty, to satisfy a debt due him by Barrett; that the latter refused to sell unless the mortgage debt was satisfied; that Price proposed to obtain a release of the mortgage, by transferring to Poore three negotiable notes made by Campbell & Brooks, and paying the residue by other means; that Price represented the makers of the notes to be solvent; that Poore at first refused to take the notes, saying he did not wish to buy a lawsuit, and suggesting a fear that the notes might be contested for usury; that Price then represented that the notes were secured on property of ten times their value, and assured Poore that as soon as any objection should be made to the notes for usury, he would at once pay them himself. By these representations Poore was induced to accept the transfer of the notes without indorsement by Price, and to release the mortgage. The notes were not in fact amply secured. One of them was paid to Poore after



the transfer. The two others were renewed for six months with the assent of Price. The renewed notes were protested at maturity, and action brought thereupon. Campbell then filed his bill against Price and Poore, charging usury and extortion against Price, and obtained an injunction. This suit was, after a long controversy between Price and Campbell, terminated by its dismissal, for the failure of the latter to file a bond for costs, before the final decree in the present suit.

The present bill prayed that the lien of the original mortgage made by Barrett be restored to the complainant; that the house and lot be sold, etc. The chancellor dismissed the bill. Poore appealed.

*Taylor and Stanard*, for the appellant.

*Johnson*, for the appellee.

CARR, J. I feel no doubt about the facts of this case: the evidence establishes all the material allegations of the bill, and wholly discredits the answer. [He stated the case as alleged, and, in his opinion, fully proved.] My only difficulty has been on the question of jurisdiction; for I am principled against stretching the doctrines of equity, to take in every case which seems to present hardship. Upon examination, however, I am satisfied, that the bill presents a case proper for relief in equity. It expressly charges fraud in the contract, and prays a decree against Price for the amount of the notes, and a sale of the house and lot in default of payment. Fraud is one of the largest and most fruitful heads of equity. In 1 Madd. Ch. Pr. 258, the general proposition is laid down, and many cases cited in support of it, that "in all cases of fraud not penal, a court of equity has a concurrent jurisdiction with courts of law, with the exception as to fraud in obtaining a will." It will be observed, that the very phrase (concurrent jurisdiction) gives the idea, that equity may act, where there is also a remedy at law; and the cases show this clearly. Thus, in *Coll v. Woollaston*, 2 P. Wms. 156, the defendant had invented a project for extracting oil out of radishes, for which he obtained a patent and sold out shares, at twenty pounds a piece; the plaintiffs had bought six shares, and paid one hundred and twenty pounds for them; the thing turned out a bubble, and they filed their bill to recover back the money. It was objected, that if aggrieved, they had a plain remedy at law; but the bill was sustained, and a decree rendered. On the point of jurisdiction, the court said: "It is no objection, that the parties have their remedy at law, and may

bring an action, for money had and received to the plaintiff's own use; for in cases of fraud, the court of equity has a concurrent jurisdiction with the common law—matter of fraud being the great subject of relief here." *Stent v. Bailis*, Id. 220, is a case of the same kind, where the same objection received the same answer. I consider these cases exactly in point. But it seems to me, there is another ground of equity. Poore had a lien on Barrett's property (I do not speak of the equitable lien—he had an actual incumbrance by deed), and this he was induced to release, by that false and fraudulent representation, which Price made as to the notes, and which formed a part of the very contract, by which Price obtained the property. Now, we know, that fraud or covin, as is said in *Fermor's case*, 3 Co. 77, and repeated by Lord Mansfield, in *Bright v. Eynon*, 1 Burr. 395, may, in judgment of law, avoid every kind of act; and we know also, that, in such cases, it is the peculiar province of equity to place the parties as nearly as may be in their former situation. Price still holds this property, and the bill prays that the plaintiff's lien on it may be revived, and that in default of payment of the notes by Price, there may be a decree for the sale of the property. And this seems to me clearly just. We do not know what may be the circumstances of Price, nor can this make any difference in the principle: but suppose him insolvent, except as to this property, would it not be very unjust, that he should hold it clear of the lien which he had, by his own fraud, induced the plaintiff to give up.

I think, therefore, that the decree should be reversed and a decree entered here, for the amount of the notes, with interest, to be paid within a given time; and, in default of such payment, that the property be sold to raise the money.

CABELL and BROOKE, JJ., concurred.

TUCKER, P. The case alleged in the bill is completely proved. The bill sets forth a detail of facts, out of which arise two substantive reasons for charging the defendant. That, indeed, on which the draughtsman of the bill seems to have principally relied, was the promise of Price to pay the notes, if the defense of usury should be set up. But it is also alleged, that Price, when he transferred the notes of Campbell and Brooks, stated them to be perfectly good, the payment being secured upon property of ten-fold the value. Now, if this was not true; if Campbell and Brooks were insolvent; if Price's indorsement of the notes was dispensed with, so that there was to be no responsi-

bility on his part on the ground of insolvency; and if, obviously, this was all done in consequence of Price's assurance that Campbell and Brooks were good, and these notes well secured; it is very clear, that this allegation is all-important, and that if the waiver of Price's own responsibility as an indorser, was the consequence of these false representations made by him, such release of Price must be considered void, and he regarded as bound for the demand. There are, then, two foundations for the claim to relief: 1. The agreement to be responsible upon the plea of usury being resorted to; and, 2. The fraud of Price, in representing the paper as well secured, and absolving himself from liability by transferring the notes without indorsing them.

The last of these grounds is amply sufficient to sustain the jurisdiction of the court; for Poore could not make Price responsible at law for the insolvency of Campbell and Brooks, since his name does not appear upon the notes, and it was understood that there was to be no responsibility on the ground of insolvency. But in equity, he is made responsible, by reason of the fraud and misrepresentation.

The first ground may also be maintained in a court of equity, under the circumstances of this case; a suit being at that time in progress between Campbell on the one part, and Poore and Price on the other, in relation to the same transaction. This suit gave the court of equity cognizance of the controversy, and there could be no doubt of the right of Poore to file a cross-bill, asking relief in case the usury should be established. But he claimed to charge him as soon as the defense of usury should be set up. Here, then, were two grounds upon which Price might be chargeable, on the last of which Poore might fail; and even though it should be admitted that Poore might have asserted his right, as to either, in a court of law, yet, as the court of equity clearly had jurisdiction as to the former, as incidental to the suit already depending there, it was proper that the other matter should be also brought before it, instead of having two litigations, before different tribunals, in relation to the same transaction. But if this be not so, still as Poore was induced to take the paper by false representations, equity has cognizance to relieve against the fraud, to set aside the contract, and place Poore in the situation he held before it; that is, as a creditor having an express lien for his debt upon the property purchased by Price. In all these various points of view, I think the court had jurisdiction, and instead of dismissing the bill should have decreed for the plaintiff.

This decree, I think, should have been, in the first instance, personal against Price, with liberty to Poore, if it proved unavailing, to resort to his lien, in the same manner and to the same extent (but no farther), as if that lien had never been released; for, in my opinion, upon setting aside the fraudulent transaction, Poore should be reinstated in his rights, in the same extent as if the contract never had been made.

Decree reversed.

Absent, GREEN, J.

**RELEASE OR DISCHARGE OF MORTGAGE** procured or occasioned by fraud or mistake will be vacated in equity. If the release was made by a party competent to make it, it will not be canceled where third persons have in good faith acquired interests which will be prejudiced by reviving the mortgage. But if the cancellation is the voluntary, unauthorized act of the recorder, it is said that the mortgagee's rights are in no way imperiled, and that they may be asserted even against those who have acted in good faith, relying upon the record: *Jones on Mort.*, secs. 966, 970; *Harris v. Cook*, 28 N. J. Eq. 345; *Mechanics' Building Association v. Ferguson*, 29 La. Ann. 548. In *Russell v. Mixer*, 42 Cal. 475, the plaintiff was granted relief, upon showing that he purchased the mortgage and intended to obtain an assignment thereof, instead of which, he went to the recorder's office with the mortgagee, and caused the latter to enter satisfaction of record, they both acting under the hallucination that the proceeding would transfer the mortgage from the one to the other.

**CONCURRENT JURISDICTION OF CASES OF FRAUD** exists at law and in equity: *Garland v. Rives*, 15 Am. Dec. 756; as in cases of misrepresentation: *State v. Gaillard*, 1 Am. Dec. 628; of taking and registering a conveyance with notice of a prior one: *Jackson v. Burgott*, 6 Id. 349; of fraudulent concealment, by vendor, of material facts: *Fleming v. Slocumb*, 9 Id. 224. Courts of law, it is said, relieve against fraud negatively as by not permitting parties to recover upon deeds or contracts fraudulently obtained: *Lamborn v. Watson*, 14 Id. 275. Some of the authorities state that one of the distinctions between equitable and legal jurisdiction upon fraud is, that by the former fraud may be presumed from the nature of the transaction and the situation of the parties, while by the latter it must be proved: *Jackson v. King*, 15 Id. 354 and note.

## STURTEVANT v. GOODE.

[5 LEIGH, 83.]

**WITHHOLDING A WRITTEN AGREEMENT BY ONE OF THE PARTIES**, so that no copy can be obtained, and under such circumstances that an action at law can not, on account of such withholding, be properly prosecuted, entitles the other party to relief and accounting in equity.

**BILL** in equity by Sturtevant against Goode. The former had been employed by the latter to build a dwelling-house in accordance with a plan agreed upon. Goode had executed a cov-

enant, and delivered it to Sturtevant, showing that he would pay for the work if done in accordance with their articles of agreement. These articles, however, were in the hands of Goode, and they contained full specifications of the particulars of the work to be done. During the progress of the work an addition to the house was agreed upon, and a further covenant was delivered by Goode to Sturtevant, and further articles of agreement between Goode and Sturtevant were executed, containing full specifications, and were delivered to Goode. Sturtevant also claimed that he had done work and furnished material not provided for in either of the articles of agreement. Sturtevant, having brought an action at law to recover the balance claimed to be due, found himself unable to proceed, or even to frame his declaration, for want of copies of the articles of agreement, and Goode, upon demand made, refused to permit an inspection or copy thereof. The action was then dismissed by agreement, and without prejudice to any other suit Sturtevant might elect to bring. The present bill prayed that Goode might be compelled to produce and file the two articles of agreement; that an account be taken, and the balance found due complainant be decreed to be paid to him. Demurrer to the bill was sustained, and it was dismissed without prejudice to an action at law, the chancellor relying on *Smith v. Marks*, 2 Rand. 449.

*Johnson*, for the appellant. Equity will grant relief: 1. Because the two agreements in defendant's possession prevent complainant from proceeding at law; 2. Because the accounts between the parties arose out of distinct contracts, and are so complicated that they can not be accurately adjusted at law, and if they could, it would require several actions to accomplish that result.

*Taylor*, for the appellee.

TUCKER, P. I am clearly of opinion, that the bill in this case set forth facts that gave jurisdiction to the court of chancery. Without entering upon any other part of the case, than that which respects the withholding of the agreements by Goode, I will observe, that the agreements in Goode's possession, were so intimately connected with the covenants in Sturtevant's possession, that it is difficult to imagine how the latter could have declared in covenant without them. Admitting that this difficulty could have been avoided by alleging that Goode withheld the agreements, and had put a stop to the work before it

was finished; yet new difficulties must have arisen on the trial. The refusal of Goode to permit Sturtevant to proceed, would have absolved him from the necessity of averring performance, and gave him a right of action against Goode upon the covenants; yet the quantum of damages would depend, in a good measure, upon the terms of the agreements; for though Goode did arrest the progress of the work, it might not follow, as of course, that Sturtevant was to recover the whole contract price. Part of that price being in consideration of the materials he was to furnish, if he was stopped in the work, and did not furnish them, part of the price should of course be abated. Again, as to the extra work, it was essential that the agreements should be exhibited to enable the plaintiff to prepare his case, by distinguishing the contract work from the extra work. Was it reasonable to expect, in such a transaction as this, that he could do this upon the spur of the occasion, in a trial at law, when the defendant should, after the jury were sworn, produce the agreements? Was it reasonable to expect him to go to trial with such a hazard? He did commence an action at law. His counsel felt the necessity, no doubt, of his having these papers; and, in consequence, he sent a note to Goode, requesting copies of the agreements. They were refused: Goode kept them in his possession, and would not even let him have copies. What right had he to withhold copies of agreements signed by both, and which on principle belonged to both? What wonder, then, that Sturtevant found himself compelled to dismiss his suit? Would he have done so, if it had not been manifest to his counsel, that he could not get along with the case without the agreements? Goode had no right to judge for him, whether the suit could have been maintained without them. He can not be received to say here, through his counsel, "I avow that I withheld these papers, which you thought necessary for the prosecution of your demand; you might have gone on to try your cause without them."

If Goode preferred a jury trial, he should have frankly afforded copies of the papers, which his adversary thought essential for the prosecution of his suit. As he did not, he can not complain, that he has been brought into a court of equity, since he compelled Sturtevant to come here. Nor can he, under such circumstances, object to the jurisdiction. He can not be permitted to drive his adversary from the court of law, by withholding papers, and then to drive him from the court of chancery,

because he did not hazard a trial at law without them. I am, therefore, clearly of opinion to sustain the jurisdiction. This is not the case of *Smith v. Marks*; it is a case *sui generis*. I have rarely known one in which the objection to the jurisdiction of equity was made with less propriety by a defendant.

The other judges concurred. Decree reversed, and cause remanded to the court of chancery.

Absent, BROOKE and GREEN, JJ.

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### MARSHALL v. COLVERT ET AL.

[5 LEIGH, 146.]

**SURETY FOR WHOSE INDEMNITY** a trust deed has been given, is entitled to the aid of equity, to prevent the payment of the proceeds of the sale of the trust property under execution, until his liability as surety is ascertained, and is discharged out of such proceeds.

In equity. Marshall, being surety upon the bond of Wm. Colvert as executor, procured the latter to convey to Robert Colvin certain slaves and real estate, to hold in trust to indemnify Marshall from loss as such surety, and with power to sell the slaves first, and if they proved insufficient to accomplish the purposes of the trust, then to sell the land. Subsequent to the recording of this deed, three writs of *fi. fa.* and five writs of *ca. sa.* against Colvert, were delivered to the sheriff. Under the former writs, the slaves were levied upon, and to obtain release from the latter, Colvert availed himself of the statute for the relief of insolvents, and surrendered his equity of redemption in the property embraced in the trust deed. Marshall filed his bill against Colvert, the sheriff, and the judgment creditors, showing, among other facts, that he was liable to suffer loss, in an amount not now capable of being definitely ascertained, by reason of the waste of Colvert, as executor, and by reason of a claim against the estate of Colvert's testator. The chancellor permitted the slaves to be sold, but enjoined the payment of the proceeds to the creditors until the further order of the court. The slaves were subsequently sold for one thousand seven hundred and twenty-one dollars. Subsequently, on motion of the defendants, the injunction was dissolved. Marshall appealed.

*Stanard*, for the appellant.

*Harrison*, for the appellees.

BROOKE, J. It was only in a court of equity, that the claim of

Marshall could be adjusted. He claimed indemnity against his suretyship for Colvert; and as no fraud in the deed of trust is proved or alleged, that deed gave him priority over the executions. The only creditor, who answered the bill, claimed priority to any of the other creditors, out of the surplus after the purposes of the deed of trust were satisfied. An account ought to have been taken, the amount of the responsibility of Marshall for Colvert ascertained, and the surplus, if any, applied to the payment of the executions, according to the priority they gave to the proceeds of the property. The decree is reversed, the injunction reinstated, and the cause remanded for further proceedings.

Absent, TUCKER, P., and CABELL, J.

### BOISSEAU ET AL. v. ALDRIDGES.

[5 LEIGH, 222.]

**IN CONSTRUING A WILL, THE INTENT OF THE TESTATOR IS THE GREAT POINT to be ascertained and effectuated.**

**HEIR MAY BE DISINHERITED BY IMPLICATION**, if such implication be necessary to effect the clear intent of the testator. Necessary implication results from so strong a probability of intention, that an intention contrary to that imputed to the testator, can not be supposed.

**HEIR CAN NOT BE DISINHERITED UNLESS THE ESTATE IS GIVEN to somebody else.**

**WRITING TO PREVENT TWO HEIRS NAMED THEREIN FROM HAVING ANY PART OF THE WRITER'S ESTATE**, but not making any disposition of his property, can not operate to disinherit the two heirs named, and to give the estate to the other heirs; and this is true, although from bequeathing a contingent legacy, the writing is testamentary in its character, and entitled to admission to probate.

**BILL** in equity by Bennett Aldridge, and his wife Dorothy, and Burwell Aldridge, and Martha, his wife, against Sarah Boisseau, administratrix, and in her own right, and others. The female plaintiffs were sisters of John G. Boisseau, who died in 1831, and left a writing as follows:

"Not having made any will so as to dispose of my property, and two of my sisters marrying contrary to my wish, should I not make one, I wish this instrument to prevent either of their husbands from having one cent of my estate—say the husbands of my two sisters, Martha Aldridge and Dorothy Aldridge—nor either of them to have one cent, unless they should survive their husbands; in that case, I leave them, to be paid out of the



collection of any of my moneys, five hundred dollars each. Given under my hand and seal, this twenty-seventh August, 1829.

JOHN G. BOISSEAU. [SEAL.]

"N. B. Having so long been in public business, my handwriting can be easily proved. J. G. B."

This paper was indorsed "Memorandum to prevent Bennett Aldridge and Burwell Aldridge from having any part of my estate, that each might claim in right of their wives, without a will made by me. J. G. Boisseau, twenty-seventh August, 1829." This instrument was, at the January term, 1832, of the Dinwiddie county court, admitted to probate as the last will and testament of the decedent, and letters of administration were issued to Sarah Boisseau, his sister.

The complainants prayed partition and distribution as in case of intestacy, except that they claimed that there was a contingent legacy of five hundred dollars to each of the female plaintiffs. The complainants, at a subsequent stage of the case, agreed that in case they could be required to elect, they would claim as co-heirs, and not as legatees. The court declared that the decedent had no power to dispose of his estate, other than by devising it to some person; that the negative action evinced by the instrument signed by him, was ineffectual, and that distribution must be made between the several heirs, as in cases of intestacy. Defendants applied by petition to this court for an appeal, which was allowed.

*Johnson and Leigh*, for the appellants. The writing signed by decedent is clearly a testamentary paper, and was to be operative unless and until he made some other will. It is true, the heirs must inherit the estate, unless it is given to some one else; but the writing must be construed as a devise to all the decedent's heirs, except the two sisters, Martha and Dorothy and their descendants. Upon the question of devises by implication, they cited 6 Cru. Dig., tit. 38, c. 10, secs. 19-24, pp. 206, 207; *Habergham v. Vincent*, 2 Ves. jun. 204, 225; *Bury v. Usher*, 11 Ves. 87, 92; *Roosevelt v. Fulton's Heirs*, 7 Cow. 71, 79; *Pickering v. Stamford*, 2 Ves. jun. 272; *Sympson v. Hornsby*, 3 Ves. 335; *Denn v. Gaskin*, 2 Cowp. 657; *Right v. Sidenbotham*, Doug. 759; *Jackson v. Shauber*, 7 Cow. 187. The English case of *Vachel v. Jeffries*, Prec. Ch. 169; 2 Eq. Cas. Abr. 435, also reported as *Vachel v. Brelon*, 5 Bro. P. C., Tomlin's ed. 51, shows that heirs excluded should not share in any surplus.

*Macfarland and Allison*, for the appellees. The decedent can

not be deemed to have died testate in the face of his own declaration, that he had made no will; his power to disinherit an heir, is only incident to his disposition of the estate to some one else; there can be no testacy without words indicating a design to devise or bequeath, and there can be no devise or bequest without showing the thing given, and the persons or objects to or for which it is given.

CARR, J. It was contended for the appellants, that the instrument of writing left by Mr. Boisseau, contains a complete disposition of his whole estate, real and personal, which is said to be large; and on the other side, that it bequeaths two legacies of five hundred dollars each, contingently, leaving the testator intestate as to all the rest of his estate.

When I heard the argument (and it was very ably argued on both sides) I was strongly impressed with the opinion, that this was a full disposition of the whole estate; and the impression remained for some time; but it grew weaker, as I looked more closely into the subject, and especially into the will itself, till at length I became convinced, that this must be pronounced an intestacy as to all but the two legacies. When I say convinced, I do not mean that I have no doubt, but that this is the decided inclination of my mind.

The books have laid down many rules to assist us in the construction of wills. The great point to be ascertained, is the intent of the testator. Where this is clear, and violates no rule of law, it must govern with absolute sway; everything yields to it. Property real or personal, even to the disinherison of the heir, may be given by implication, if such implication be necessary to effect the clear intent of the testator. In *Wilkinson v. Adam*, 1 Ves. & Bea. 465, Lord Eldon says: "With regard to that expression necessary implication, I will repeat what I have before stated, from a note of Lord Hardwicke's judgment in *Coriton v. Hellier*; that in construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator can not be supposed." Again, Lord Mansfield, as cited by Lord Loughborough in *Lytton v. Lytton*, 4 Bro. C. C. 460, says: "A great dispute has been made, of what is a necessary implication." "It is that implication which arises upon the words the testator has made use of, that clearly satisfies the court what was his meaning—and that, as put in opposition to conjecture." Let us look now at the writing in question. No

words could have expressed more clearly and strongly, the intention of the writer, to exclude his brothers-in-law, and their wives too, unless they survived them, from all participation in his estate. But it was admitted that mere words of exclusion would not operate, as a man can only exclude his heirs and next of kin by an actual devise or bequest to others.

It was strongly contended, however, that this will, by clear and necessary implication, gave the whole estate to the heirs and next of kin, as designated by the statutes, excepting the two excluded sisters and their descendants, from all but their contingent legacies. Many authorities were cited and discussed; but the view I take of the case renders it unnecessary to examine them. My opinion is formed on the paper itself. After the most careful consideration, it seems to me, that so far from furnishing a necessary implication of the writer's intent to dispose of his whole estate, it shows strongly, that he did not mean by this writing, to dispose of one cent beyond the two legacies of five hundred dollars. Intention being the life and soul of a will, it can hardly be imagined, I presume, that a man can make a will without intending to do so, or give by it more than he means to give; especially, a man who has been long in business, has made a large estate; and knows well how to express his meaning. Such men are most particular; knowing the full value of their property, they bestow it with care and caution, and parcel it out with particularity among the objects of their bounty. Can we suppose, that such a man sitting down with the deliberate intention of giving away his whole estate, lands, slaves, and other personalty, would have expressed such intention in the way this paper does? Is it the natural, the probable manner, in which a plain man of business would devise and dispose of his property? Merely to exclude two sisters from all, but a small legacy, without saying one word about the rest of his large estate, though he meant to dispose of the whole, and that by this very paper? Taking even this general view of the subject, I can not believe that any man would act thus.

But this opinion is greatly strengthened by a more particular analysis of this paper. He begins thus: "Not having made any will so as to dispose of my property"—what then? We should naturally conclude, that if he meant this writing to be such will, he would go on to declare it; but no; he proceeds, "and two of my sisters marrying contrary to my wish, should I not make one" (could a man, in his senses, put these words into the very will he was then writing?) "should I not make

one, I wish this instrument"—to do what? "to prevent their husbands from having a cent of my estate, and my sisters also, unless they outlive their husbands—in that case I leave them five hundred dollars each."

Do not these words clearly show, that the sole purpose of this paper was to exclude the offending parties, except as to the five hundred dollars each? that he never had the idea, that by this writing he was disposing of his estate? If he had meant this as his will, would he not have called it so, and not have spoken of a future intention, a suspended intention, of making a will? Would he not have appointed executors? But farther, look at the indorsement written by himself on this paper: "Memorandum; to prevent Bennett Aldridge and Burwell Aldridge from having any of my estate, that each might claim in right of their wives, without a will made by me." This shows to me, his knowledge, that if he died simply intestate, these men might claim part of his estate; which claim he thought he could prevent, and meant to prevent by this instrument, in case he should not write a will; repeating the idea he had expressed in the body of the paper—"not having made a will, should I not make one, I wish this instrument to prevent," etc. The two contingent gifts of five hundred dollars entitled this writing to probate as a testamentary paper; just as an indorsement upon a note, "I give this note to A.," may be proved as testamentary: *Chaworth v. Beech*, 4 Ves. 555, 565. But not a step further can I agree to extend it; for I am well satisfied, that the writer never dreamed of this as a will disposing of his estate generally.

It would seem hardly necessary to cite cases in support of this view of the subject; but I will refer to one: *Matthews v. Warner*, 4 Ves. 186; 5 Id. 23. There, a paper was written, which began thus: "2d Nov. 1785. A plan of a will proposed to be drawn out, as the last will and testament of William Matthews," etc. The writer then went on by words of "present disposition" to give away his whole estate, making residuary legatees, appointing executors, signing and dating the paper, the whole being in his own handwriting. Upon it was this indorsement: "2d Oct. 1785. A plan designed for the last will and testament of William Matthews, storekeeper," etc. The judge of the prerogative court decided this to be a valid will. Upon appeal to the court of delegates, the decision was affirmed. The case was then heard by the lord chancellor, upon a petition for a commission of review; and he thinking it not a valid paper, a commission of review issued; under which, as we see, 5 Ves.

23, the sentence of the court of delegates and prerogative judge was reversed, and the deceased declared intestate. Upon the hearing before the chancellor, Lord Loughborough, he makes some strong remarks, which seem to me very appropriate to the case before us.

After dwelling with emphasis on the commencement and indorsement, calling it the plan of a will proposed to be drawn, etc., and admitting that it contains legatory words of present gift, etc., he adds: "I should have no difficulty, sitting as I have sat in a court of law, to put it so to the jury, that I should expect a verdict, that he had not devised; that it was no will, but only a project of a will—not a complete, definite rule of law for settling his fortune. It is not, it can not be, denied, the argument presses so strong, that upon the perusal of this paper, the natural conclusion is, that it was his intention to make a more formal paper than this. That inference can not possibly be avoided. Then, *ex hypothesi*, this paper, at the time he subscribed it, was not the law, the testament." And so I say of the paper before us, that it was never the law, the testament, by which Boisseau meant to dispose of his estate, further than as to the two legacies of five hundred dollars. I am for affirming the decree.

CABELL, J. I concur in affirming the decree.

BROOKE, J. It is somewhat remarkable, that this case has no exact example in any of the English cases which have been cited, or to which I have been able to refer. It must be decided, therefore, on principle and not on authority.

I think it is a principle not to be controverted, that a testator can not disinherit his heir, unless he devises his estate to somebody else. This principle is fully recognized by Lord Mansfield in the case of *Denn v. Gaskin*. To give to a testator the power to disinherit his heirs, whom the law has appointed to take the estate, unless he devises it to some other person, would be, in effect, to give him authority to repeal the statutes of descents and distributions. That a testator may disinherit his heirs, by giving his estate to somebody else, can not be doubted; but if, in every case in which he intends to exclude his heirs from the inheritance, it is to be implied from that alone, that he devises his estate to those who (some of his heirs being excluded) would take the inheritance, the principle, that to disinherit his heirs he must devise his estate to somebody else, would be of no consequence; because every exclusion of his heirs would be a devise to somebody else.

This principle, that a testator can not disinherit his heirs, unless he devises his estate to somebody else, results from the nature of property. It is the creature of the law, and the law will dispose of it, unless, under the permission which the law gives the owner to make a will, he disposes of it. And, in examining cases of this kind, we are not to forget, that those who claim under the law, have as strong a claim to the property, as those who claim under the will; indeed, somewhat stronger, since it is a settled principle, that if a devise gives no other estate than the law gives, those who are to take, take under the law and not under the will, their title under the law being preferable to their title under the will.

With these remarks I shall proceed to examine the will before us. The first remark I shall make on this "instrument," as the testator calls it, is, that it wants at least one of the features of a will; the testator makes no executor; which is some evidence, corroborated by the terms of the instrument, that he did not intend it as a will of his whole estate, but to have no other operation than to exclude his two sisters, and their husbands, from any other portion of his estate, but the two legacies given to the two sisters in the event they survived their husbands, and in the event of his not disposing of his estate by another will. His whole mind appears by the instrument, to have been occupied with the intent, first, to exclude the husbands of his two sisters from getting any portion of his estate, and secondly, to exclude his two sisters themselves, except the two contingent legacies bequeathed to them. The memorandum upon the instrument explains his main intent to be, to exclude the two husbands from getting any portion of his estate. Taking the meaning of both (the instrument, as he calls it, and the memorandum) from their words, language could not be more full to convey this intent, and no other. To infer that the testator meant more, I think is impossible. That he meant to give the rest of his estate to those who would take it, according to law, the two sisters being excluded, would be an inference that would violate every fair construction of the instrument and memorandum, and would establish a principle in direct opposition to the acknowledged principle, that a testator can not disinherit his heirs, unless he gives his estate to some one else. The inference that he does give it to somebody else, from the mere exclusion of some of his heirs, without a single testamentary expression to justify it, would give to a testator the power to repeal the law of descents and distributions: for, as he has not

designated those who are to take under the will, and they are to take by inference only, they would take according to the law, but not under the law.

No judge was more accurate in language than Lord Mansfield. In *Denn v. Gaskin*, he said, that though the intention is ever so apparent, the heir at law must inherit of course, unless the estate is given to somebody else. What intention was meant? The intention to disinherit the heir. Now, the inference from that intention, if sufficient to give the estate to somebody else, would have rendered the words "unless the estate is given to somebody else," entirely superfluous.

To carry the doctrine of implication so far, would make a will for the testator, and not interpret the will made by him. When a testator has devised his estate by will, and is not precise as to the persons who are to take, or as to the quantity of estate they are to take, from necessity, and to effectuate his intention to dispose of his estate, and not to leave it to the law to dispose of it, courts imply his intent as to persons, and the quantity of estate they are to take. But when the question is, whether he intended to devise his estate or not, we are not authorized to imply that he does, unless it is a necessary inference from the language he uses. In *Denn v. Gaskin*, the testator began his will thus: "As to all such worldly estate as God has indued me with," etc., and the question was, whether by inference from those words, the devisees in the will took a fee or life estates. Lord Mansfield said: "He does not say in the introduction, that he means to dispose of all of his estate; but that with respect to it, he devises so and so. If he did mean it, the misfortune is, that *quod voluit non dixit*." He would not infer from the words "as to all such worldly estate as God has indued me with," that the testator meant to dispose of all of his estate; because if he did mean it, he had not said it: he would not by inference dispose of the testator's estate for him; because it was not a necessary inference from the words used, that he meant to dispose of his whole estate.

The case on which most stress was laid in the argument by the counsel for the appellant, is *Vachel v. Breton*, decided in the house of lords. Upon consideration of that case (which is doubtfully reported) I think it will be found not to have turned on the question now before us. The reporter of it refers to *Mason v. Hawkins*, and *Matthew v. Fitzsimon*, 4 Bro. P. C. 711, for the principle on which it was decided. In *Vachel v. Breton*, the testator had disposed of his whole estate; there was no in-

testacy, nor any question on that point: he bequeathed to two of his wife's children (whom he did not own as his) ten shillings, each, and no more, and to his other children specific legacies in plate, etc.; he appointed his executors, and gave them legacies, but did not add, for their care and pains, or anything to that purpose: and the question was, whether the executors were to take the surplus, notwithstanding they took legacies, or whether it was to be distributed among all the children, including the two to whom ten shillings and no more was bequeathed by the will?

The court deciding that the executors took the surplus as fiduciaries, and not in their own right, the question then was, how it was to be distributed? whether among all the children, as had been decreed by the court of chancery, or in exclusion of the two children to whom ten shillings only had been bequeathed? and the house of lords decided against the two latter children, but not on the principle, that the testator had excluded them by giving his estate to somebody else, inferable from the terms of the will alone excluding them from the inheritance. No such inference was necessary. The testator had devised the whole of the estate, and but for the devise of the legacies to his executors, they would have taken the surplus; and that was to be distributed according to the intention of his will, to be collected from every part of it. The doctrine of implication as to whom he intended to give his property to, was entirely applicable. The testator had availed himself of the permission of the law to dispose of his property; he had taken it out of the hands of the law; and the court was to decide to whom he had given it. His will was not like the one before us, in which the testator has designated neither the persons who are to take, nor the quantum of estate to be taken, all of which is to be inferred (if at all) from the single circumstance, that he meant to exclude his two sisters and their husbands.

The case of *Pickering v. Stamford* was commented on in the argument. In that case, after a devise in satisfaction of the widow's dower, in the strongest language of exclusion of his wife from taking any other part of his estate, the testator devised a large portion of his estate to a charity; but a portion of it, consisting of real securities, did not pass, being prohibited by the statutes of mortmain, and, of consequence, he died intestate as to that portion. The trustees appointed could not take. The widow was held not to be barred of her share. Claim-



ing under the law, she was entitled to recover her share in that portion of his property, which the testator had not disposed of, and as to which he died intestate. Strongly expressed as the intention of the testator was to exclude her, the court did not infer from that circumstance a devise to somebody else, and thereby exclude her.

The difference between the cases of *Pickering v. Stamford* and *Vachel v. Breton*, consists in this; that in the former, there was an intestacy as to a portion of the property, and the widow could not be excluded from her claim under the law, the property not being given to any one else; but in *Vachel v. Breton*, the property was given to somebody else; the executors took it; there was no intestacy as to any portion of it; but legacies being given to the executors, they took the property, not in their own right, but as fiduciaries for the next of kin; and on that ground, the court excluded two of the children, according to the expressed intention of the testator.

I think the decree must be affirmed.

TUCKER, P. The will which is the subject of litigation in this case, presents, in my opinion, a question of very great difficulty; and though I have, after anxious investigation of it, arrived at the conclusion which the authorities, and the reason of the case, seem to demand, I confess I am not entirely without a doubt of its correctness.

To enable us to arrive at the real point upon which the case at last must turn, it may be as well to get rid at once, of a good many matters which otherwise might embarrass the discussion of the real question. I shall, therefore, at the threshold, remark, that the character of this instrument as a testamentary paper must be taken, if not as a *concessum*, at least as a matter adjudicated, and which in this case can not be contested. It is a will, and has been admitted as such by the court of probate, and is valid both as a will of real and personal estate, if any such be disposed of by it. If, indeed, there be no such disposition, then there can be no doubt that it is ineffectual. For the statute gives the power to devise, and not merely to disinherit; and nothing can be more just than the position taken by Mr. Macfarland, in his very lucid and able argument, that the heir can not be disinherited by a will which does not dispose of the estate to another. So too, it is very well settled, by the uniform and concurrent opinion of the learned, that the heir at law shall not be disinherited, except by express words or by necessary implication. And this, I conceive, not

from any peculiar partiality to the heir growing out of the doctrines of primogeniture, but for other and higher reasons.

The law having, upon the principles of natural affection and duty, modified, indeed, by the policy which gives a preference to the eldest son over his brethren, prescribed the course of transmission of the estate of a decedent, will not imply, that he has suppressed the dictates of natural feeling, or disregarded the rule established by the law, unless the intention to do so is clearly to be demonstrated. Indeed, the law having provided for the descent to the heir, his title is certain and unquestionable, unless it be taken away by the testator. Shall that certain and unquestionable title, then, be defeated by doubtful implication? Shall a right having its foundations in nature, and its sanctions in municipal regulation, be overthrown, unless by express provision or necessary implication? Assuredly not; and it is for this reason, which applies not less to the descent of estates in coparcenary than to the law of primogeniture, that the courts have always held, that the heir shall not be disinherited by mere words of exclusion, which do not imply a devise to another. I concur, therefore, in the opinion of Chief Justice Tilghman, in *French v. McIlhenny*, 2 Binn. 20, that the rule of the English law, in this respect, is not less applicable to our institutions, than to those of Great Britain. Our law may be said, indeed, to be a transcript of the human affections, and I can not think, that, upon slight presumptions or implications, a testator shall be made to violate them.

I proceed, next, to observe, that as no man can institute a law of descent for his own property, in conflict with the general law, so if in this case the relations not excluded, are entitled to the whole estate, they must take it as devisees, and not as heirs. This is, indeed, sufficiently obvious as to that portion of the property, which, but for their disinheritance, would have fallen to the lot of the two sisters mentioned in the will. But it is not less true as to the residue; for it can not be, that those who take should hold undivided portions by descent, and other undivided portions by devise; nor, indeed, would they hold any portion in the same manner as they would have held it in the case of an intestacy. The real question in the case, then, is, whether there is a devise in this will, to the heirs of the decedent other than the excluded sisters?

There is certainly no express devise. But it is well settled, that an estate may pass by will without express words, where the intention to devise is necessarily to be implied. And this

is but a fair and proper construction of the statute of wills. For that statute authorizes the devise of estates, without prescribing any form in which the power shall be exercised. And as there is no set form of words for devises, so it has come to be a canon of the law, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the law. Hence, the first inquiry, in the construction of a will, always is, what is the intention of a testator? and the second is, whether that intention is consistent with the law? If it be, then it is the province of the court to effectuate it, and so to mold its provisions, as to render them consonant with law, and agreeable to the design of the testator.

A court, however, can make a will for no man. And if the testator has so expressed himself as to show, that whatever he may have designed, he has not carried that design into execution, the defect can not be supplied. *Voluit non dixit* is the judgment to be pronounced upon the case. Yet this principle is in no wise incompatible with the construction already adverted to, which creates a devise by necessary implication. It only inhibits the implication of a devise, where there is no necessity for it. Thus, if a man devises lands to his heir after his wife's death, the wife by implication shall have it for life, although it is not expressly given to her: *Vaugh.* 262, 263. For, as the heir is not to have it till the wife's death, and as nobody else could, the implication is inevitable, that the testator must have intended the wife to have it, though he has not expressly said so. But, if the testator devises lands to a stranger after his wife's death, this is no devise to the wife; for as the heir may hold it during her life, there is no necessary implication that he intended the wife to hold it; however strong the probability, that as he postponed the devise to the stranger, till his wife's death, he therefore looked to her enjoyment of the estate in the mean time: 6 *Cru.* 206; *Vaugh.* 259; 2 *Lev.* 207.

Let us now proceed to look into this case. The testator, obviously with a knowledge, that in the event of his intestacy, his sisters who are named in the will, would come into the inheritance with his other heirs, unless he should provide otherwise, executed this testamentary paper, declaring its intent to be, to prevent the husbands of his sisters Martha and Dorothy from receiving one cent of his estate, or his sisters themselves, unless they should survive their husbands, and then only five hundred dollars each. And the question is, whether these words are to be construed as giving, by implication, the whole

estate to the other heirs? for it can not be denied, that if they fall short of that, if they are to be construed only as words of exclusion, they do not operate to break the descent, but the estate will descend and pass to all the heirs, as if this instrument never had been made.

Apply now the rules already mentioned. What was the intention of the testator? About this, I think, there can be no doubt. That he designed to exclude the sisters, is expressed. That he knew that by law his estate would, in case of his death, have gone, but for this paper, to them and others, is not merely to be fairly presumed, but is inevitably implied from the very act of preparing such a paper. If, then, he excluded them, but did not exclude the others, who by law would take if not excluded, it is clear he did not design to exclude these last, but did design that they should take the whole.

Here, then, is the intention of the testator, plainly and necessarily implied. That intention having nothing in it inconsistent with the rules of law must be effectuated. And how? By construing the will to be a devise to all the heirs of the testator, except the two sisters who are expressly excluded.

This, however, is contested, as in conflict with the principles recognized from generation to generation by the sages of the law, that though the intention to disinherit the heir be ever so apparent, the heir at law must inherit unless the estate is given to somebody else. And it is ingeniously remarked, that the principle thus established, would be wholly defeated, if, upon mere words of exclusion, we were to build up a devise by implication. It behooves us, therefore, to examine this doctrine and the cases cited, more narrowly, in order to see how far they go.

That the exclusion of the heir even by implication, and without express words, may raise an estate by implication in another, is proved by the familiar case before cited of a devise to the heir after the death of the testator's wife. Here, although the exclusion itself is but implied, yet there is an estate implied in the wife, from that implied exclusion. Much more, then, it would seem, may an estate be implied from an express exclusion. So too, where a man has two daughters, his co-heirs, and devises to one of them after the death of his wife; this is not only an implied exclusion of that daughter, but it is an implied exclusion of her sister also, they making together but one heir; and from this double implication of exclusion, an implication is raised of a life estate in the wife. It can not, then, be affirmed

to be a universal rule, that from words of exclusion merely, a devise by implication can not be raised.

The cases which have been cited, when properly understood, do not necessarily sustain the proposition. In all of them, it will be found, that an estate was not implied, because, in fact, there was no necessary implication to be made from the provisions of the wills. Thus, in *Denn v. Gaskin*, the devise was to A., B., and C. equally, without words of inheritance superadded. The testator gave his heir one shilling; which we will take to have been equivalent to an express exclusion. The question was, whether the estates of A., B., and C. were to be construed to be fees, either by reason of the introductory clause, or by reason of this exclusion? It was decided in the negative. And it was asked, in the case before us, if the exclusion of the heir there could not even enlarge by implication the life estates expressly given to A., B., and C., can it be construed to give and create an estate out and out, here? The answer, I think, is easy.

In the case of *Denn v. Gaskin*, admitting the exclusion of the heir, there was nothing from which the court could certainly infer what the testator designed as to the inheritance in the lands. He had given to A., B., and C. an estate, in effect, only for life, since there were no superadded words of inheritance. It was as much a life estate as if he had expressly declared it to be for life and no longer. Now, although by the express exclusion of his heir, we should infer that he did not intend him to take the inheritance, yet by giving an estate only for life to A., B., and C., it was equally clear, that he did not design that they should take it. To have given them the inheritance by implication, therefore, would have been to have made a will for the testator, and that too against the plainly expressed design that they should only have a life estate. The fair inference, as he had disinherited his heir, and limited an estate only for life to his nephews, was, that if he had gone on to dispose of the inheritance, he would most probably have limited it to the sons or descendants, either of the disinherited heir, or of the nephews who had but life interests given to them. This, at least, may have been his intention; and therefore the implication of his intention to enlarge the estate of the nephews into a fee, being only a possible and not a necessary one, could not be made consistently with legal principles. And as the implication could not be made, the fee was undevised and descended to the heir, of course, in spite of the clause by which his disinheritance was in-

tended. Again, in *Denn v. Gaskin*, the estate having been limited to both nephews, the setting aside the heir did not necessarily imply that they should be the heir; for if he had been dead, both of them could not be heir. It could not be fairly implied, that he designed to substitute them both for his heir, since, if the heir at law were out of the way, the eldest of the two alone would have been heir. Had the testator, indeed, disinherited the heir, and then devised to the next in succession, without words of inheritance, there would have been more reason for implying those words; since, in that case, the act of disherison of the person on whom the estate would devolve by law, seems to have the mere design of putting that person out of the way, that he may not impede the descent to the next in succession. Such is the case here. The testator, knowing that by law his estate would devolve on four, strikes one of the four out of the succession, that the other three may take the whole. That he must have understood it as having that effect, can scarcely be denied; and that he did it with that end, I have not a doubt.

The explanation I have given to *Denn v. Gaskin*, furnishes, I think, the solution of the cases of *Right v. Sidebotham*, Doug. 759, and *Right v. Russell*, there cited. I shall, therefore, add nothing more as to them.

The case of *Jackson v. Shauber*, 7 Cow. 187, was an ejectment, and the question merely as to the legal title. The case may have been properly decided upon the ground, that whether the heir took the legal title or not, could not affect the disposition of the beneficial interest made by the testator. Admitting the legal title to have been in the heir, he was still a trustee for the benefit of those for whom the estate was to be sold. There was, therefore, no necessity for construing the legal title to be in the executors, contrary to the express fact, that the limitation gave them only a naked authority.

No case, indeed, has been cited on the part of the appellees, which, as I conceive, is in point to that under consideration, though the expressions used by the judges are broad enough to justify very strong inferences in behalf of the heir. On the other hand, there are many cases in which implied estates have been raised, or limited estates enlarged by implication, with or without an exclusion of the heir at law or distributee. Such are the cases already cited, of the devise to the heir after the death of the wife, and the devise to one of two daughters, co-heiresses, after the death of their mother. The case, how-

ever, which seems nearest in point, is that of *Vachel v. Breton*. In that case the testator, having first given some specific and pecuniary legacies to his executors and others, directed, that his executors, out of his personal estate, should pay to two of the children of his wife (as he denominated them) ten shillings each, and the same sum to any after-born child of his wife, but he made no provision as to the residue. The executors were deemed to be excluded from the residuum by the legacies given them. The question was, what was to be done with the residuum? Should it be distributed among all the children, upon the idea of an intestacy, as to that part of his estate? or was the will to be construed as impliedly giving to the distributees who were not excluded, what was plainly denied to the children who were excluded by legacies of ten shillings and no more. The court of chancery decided, that the excluded children should come into distribution. The house of lords decided, that the whole estate should be divided among those who were not excluded.

This case is so strongly analogous to that before us, that it has very naturally been assailed by the counsel for the appellees, and several cases have been cited, in which it seems to have been questioned. In *Pickering v. Stamford*, the master of the rolls, in delivering his opinion, gives as I conceive the true exposition of *Vachel v. Breton*, in saying, "there it might fairly be held that the exclusion was for the purpose of giving a benefit to the others." The lord chancellor, however, afterwards, in the same case, did impugn the authority of this case, declared his disapproval of the reversal of the decree at the rolls by parliament, and says the case does not seem to be a case to be followed. Now it seems strange, that the inferior tribunal should thus, by its *ipse dixit*, overthrow the judgment of the superior; and it is still more strange, as there was, and is, no conflict between *Pickering v. Stamford* and *Vachel v. Breton*. The former is a case of resulting trust, where one of the trusts declared proved void: the rule, in such cases, is uniform that the part resulting must go to the heir or distributees generally (according to the nature of the estate, whether real or personal). But *Vachel v. Breton* was not, strictly speaking, the case of a trust. It was a case upon the construction of a will. The real question was, whether in defect of an express disposition of the residuum, from which the executor was excluded by a legacy, an implied bequest of it to the children who were not disinherited, should or should not

be raised? It was decided that it should. It could not have been decided otherwise. Out of the whole personalty (except some specific and pecuniary legacies previously given to the executors and others) only thirty shillings was disposed of, viz., ten shillings each to two living children, and a like sum to the child with which the wife might be enseint. It was admitted, that this bequest to them of ten shillings and no more, was designed to exclude them. What was the purpose of that exclusion? As the master of the rolls says, "it might fairly be held that the exclusion of them, was for the purpose of giving a benefit to the others." His will was, that they should be excluded. Was there anything unlawful in that will? If not, it should have been effectuated. How? By declaring an intestacy as to the great bulk of the personalty, and letting in those who were expressly excluded? Or, by raising a bequest to the others by necessary implication? The latter, assuredly. It is a case for implication, I conceive, according to all the authorities; "since an intention contrary to that imputed to the testator by the creation of such an implied devise, can not be supposed."

Upon the whole, I am of opinion, that we must construe this will as a devise by implication of the real estate to the heirs at law of the testator, and of the personalty to his distributees, with the exception, as to both, of the sisters who are excluded by this testamentary paper. They will take as devisees and not by descent, though in ascertaining the persons to take under the will, reference must be had to the statutes of descents and distributions. They will take also as tenants in common, and not as joint tenants: 1 Sch. & Lef. 84. Nor is there any thing anomalous in this; for wherever a devise is to the heir or next of kin who take as purchasers, or wherever a strict settlement is to be made under articles by which the heir and next of kin are to take as purchasers, the law of inheritance, and the statute of distributions, are referred to, to ascertain the persons who are to take: *Tabb v. Archer*, 3 Hen. & M. 399 [3 Am. Dec. 657].

It is not probable, that a case of this description will often occur. But, if it be decided, that the will does not operate to pass the estate to the heirs who stand in the same degree with those disinherited, it may operate unjustly, and to the overthrow of wills which ought to be sustained. Thus, if a man having three brothers, says, "Having already made an ample provision heretofore for my brother Thomas, I hereby declare



that he shall take no portion of my estate," without saying more; this express declaration would be defeated, and he would come into the inheritance with his other two brothers, and thus have a double portion, against the express will of the testator. I can not think this can be law.

I am of opinion that the decree should be reversed; but my brethren having taken a different view of the subject, it must be affirmed.

Decree affirmed.

Absent, BROCKENBROUGH, J.

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INTENTION OF THE TESTATOR is what the courts seek to ascertain and effectuate in construing wills, unless the law overrules the intention and will not permit it to be accomplished: *Ruston v. Ruston*, 1 Am. Dec. 283; *Kennon v. McRoberts*, Id. 428; *Covenhoven v. Shuler*, 21 Id. 74. This intention can not be sought outside of the will; but must ordinarily be determined from the words therein used: *McC Campbell v. McC Campbell*, 15 Id. 48. The whole will must be considered, and not mere isolated expressions: *Myers v. Myers*, 16 Id. 648. If two parts are irreconcilable, the latter part prevails; and if the words are susceptible of a double meaning, that should be preferred which best accords with the testator's general intent, as shown by the whole will: *Covenhoven v. Shuler*, 21 Id. 74 and note. It may, however, be shown by parol evidence, that a bequest was in trust for the benefit of a person not named in the will, and the rights of such person may be enforced: *Towles v. Burton*, 24 Id. 409 and note. Parol evidence is also admissible to explain a latent ambiguity: *Breckenridge v. Duncan*, 12 Id. 359 and note.

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## HARRISON v. LANE ET AL.

[5 LEIGH, 414.]

CONTRIBUTION BETWEEN SURETIES WILL BE DECREED whether they be on the same or different bonds, although they knew nothing of the obligations of each other; but they must be sureties for one and the same debt or obligation.

A SURETY ON ONE BOND IS NOT ENTITLED TO CONTRIBUTION FROM A SURETY ON ANOTHER, if the latter bond was not to be pursued, unless the principal could not obtain payment from the sureties on the former.

SURETY ENGAGING TO PAY ONLY IF THE CREDITOR can not get payment from other sureties, is not liable to contribution at the suit of the latter.

BILL for an injunction. James Wigginton applied to Wm. Lane, sheriff elect, for an appointment as deputy, and offered, if appointed, to give as his sureties Harrison, Hedges, Hayes, Wagoner, and Purcell. The appointment was made, and the bond executed, Harrison being the last surety to sign. Afterwards Lane, doubting the solvency of the sureties other than Harrison, required, and Wigginton gave, an additional bond,

with Hancock, Waugh, and Blackburn as sureties, in the usual form of a deputy sheriff's bond, but with an indorsement thereon, signed by Lane, to the effect that in the event of Wigginton's becoming in default, he (Lane) would not "execute the sureties in this bond" if he could be indemnified without resorting to them. This indorsement was proved to have been made at the time the second bond was executed, and in pursuance of a previous agreement between the sheriff and his deputy and the sureties on such bond.

Wigginton was guilty of official misconduct, and judgments were recovered against him and the sureties on the first bond. Harrison, the only one of these sureties who continued solvent, filed this bill, alleging that his co-sureties were insolvent when they signed the bond; that he was induced to sign by false representation that other good sureties would sign with him; that Lane refused to receive the first bond, and required the second, which was accordingly given; that the second bond was intended as a substitute for the first, or that the sureties thereon should be jointly liable with those on the first; and also claimed that the indorsement was made after the second bond was given, etc. He asked that the judgments at law be enjoined, and that the sureties on the second bond be required to contribute. The injunction was awarded, but was afterwards dissolved, and the bill dismissed. Harrison appealed.

*Nicholas and Wickham*, for the appellant.

*Briggs*, for the appellee.

CARE, J. I am of opinion that the chancellor was right in dissolving the injunction: whether he ought ever to have granted it, is a much more doubtful question. The doctrine of contribution between co-sureties has been much discussed. It is clear, that if different persons are sureties for the same debt, or for the performance of the same duties, each will be made, in equity, to contribute, though they be bound by different bonds, and though they knew nothing, at the time, of the obligations of each other. But then, they must be sureties to the same extent, and for the same debt or duty. It is equally clear, that if there be one set of sureties bound for a debt, and then the obligee takes another bond, as collateral and supplemental security, these last obligors binding themselves to pay if the principal and sureties in the first bond fail; this bond will bind them no further than they have contracted. This is of the very essence of the contract; and the case of *Craythorne v. Swinburne*, 14 Ves. 160, is

express to this point. Nor is the taking such second bond a fraud upon the obligors in the first: it does not increase their burden, or any way change their situation: they agreed each to execute the bond, and look to their principal and associates for safety. What is the case here? Wigginton applied to Lane to become his deputy, and stated that he could give certain sureties: Lane agreed to take the bond with those sureties: the bond was prepared with the six names in the body, Harrison's last, and with six seals: it was executed by the other five, and in this situation, was presented to Harrison. Nothing was said to him of additional sureties; the very form of the bond showed him that he was the last to execute it. He did execute it, and thereby bound himself jointly and severally with the others, to be liable for all defaults of the deputy. Notwithstanding this, I admit, that if another bond had been afterwards taken with other obligors, bound for the same thing and in the same manner, Harrison, on paying money for the deputy's delinquencies, would have had a right to call on these subsequent sureties for contribution. But, in the case before us, there is the most satisfactory proof that the memorandum indorsed on the second bond, showing that this bond was a supplemental security, formed a part of the agreement on which the bond was signed, and was executed at the same time. This memorandum is a part of the bond, as well as of the agreement, and must be taken as if incorporated with it. Even if there had been no memorandum, parol proof of the agreement (of which there is enough in the record) ought, I think, to have been received, and for this the case before cited is express authority. I am clear, therefore, that the decree should be affirmed.

CABELL, J. If the sureties in the second bond were bound for the same thing for which the sureties in the first bond were bound, they would be liable to contribution, although their engagement was made at a subsequent time, by a different instrument, and even without the knowledge of the first bond. But the memorandum indorsed on the second bond, is to be considered as a part of the bond itself; and the bond, thus modified, shows clearly, that they were bound for a different thing. They did not, like the sureties in the first bond, bind themselves absolutely, for all the acts of Wigginton, but for such only as the sureties in the first bond should fail to make good. This is proved also, by the parol testimony, which is admissible in a case like this. The sureties in the second bond were not, therefore, co-sureties with the sureties in the first, but were

sureties for them. The doctrines of the law, on this point, are well explained in *Craythorne v. Swinburne*. The decree should be affirmed.

TUCKER, P. The appellant asks, upon the facts set forth in his bill, relief against the sheriff, or a decree for contribution against the sureties in the second bond. If, as is alleged, the memorandum on that bond was executed at the time the bond itself was entered into, it is difficult to perceive upon what principle the plaintiff can expect to charge the sureties therein bound. The doctrine of contribution, it is true, may extend to parties who are bound by different instruments, provided they are all sureties for the same person and the same thing. But it does not therefore follow, that, by the very terms of their engagement, the sureties in a separate bond may not make themselves responsible only *sub modo*, and place themselves out of the reach of the principle of contribution. "Whether," says Lord Eldon, "contribution depends upon a principle of equity, or is founded in contract, it is clear, a person may, by contract, take himself out of the reach of it." "The question is, whether the meaning of the instrument is, that the party will be a co-surety; or that the surety in the former instrument is to be considered a principal." "If the party, not constituting himself co-surety, engages only to pay, if the creditor can not get payment from the other sureties, he withdraws himself by his contract from the reach of the principle, and the plaintiff (the surety) can not complain, as the transaction is without his knowledge, that the defendant (the supplemental surety) bound himself only to the extent he thought proper."

In a subsequent part of the same case, Lord Eldon reiterates the remark, that whether the doctrine rests "upon contract or a principle of equity, it is clear, that a party may take care by his engagement that he shall be bound only to a certain extent. That is proved by the case of *Swain v. Wall*, 1 Rep. in Ch. 80, where the engagement being to pay in thirds, that contract was held to take them out of the principle that would have required a moiety, and also by the case of *Deering v. The Earl of Winchelsea*, 2 Bos. & Pul. 270, where it was admitted, that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from a liability beyond four thousand pounds;" his bond having been for that sum only; while the other bond was for ten thousand pounds. Lord Eldon proceeds: "If therefore by his contract a party may exempt himself from the liability, or from that extent of liability in which, without a special

engagement, he would be involved, it seems to follow, that he may, by special engagement, contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him." Pursuing these principles, and after having carefully considered the case in 2 Freeman, 97, which was cited by the counsel, and has also been relied upon here, and having found that case unsupported by the register, his lordship rejected the claim to contribution, which was set up by the plaintiff in the case of *Craythorne v. Swinburne*, 14 Ves. 160. That case is singularly strong in its application to the case at bar.

It is not necessary to go into a philological examination of the memorandum on the second bond. I am satisfied, that the object of it was to absolve the supplemental sureties, unless the high sheriff could not be able to get indemnity from the sureties in the first bond. They had a right to bind themselves, or to refuse to be bound altogether. They had, therefore, a right to say how far they would be bound; and their obligation can not be carried further. It is obvious they designed only to guarantee the sufficiency of the former sureties, and they were thus (to use the language of Lord Eldon) "not co-sureties with them, but in truth sureties for them." The question, then, which it is most important to answer, refers itself to the execution of this memorandum. I shall only say, that I am satisfied it was contemporary with the execution of the bond. The nature of the transaction proves it; and so does the improbability that Lane would have signed it afterwards, when the obligors were in his power, if he declined to do so when they were not. The fact, that the bond with its indorsement was among the records of the court (for the copies are certified by the clerk) sustains the conclusion, and fortifies the presumption that this memorandum was made when the bond was executed. So we must take it, as the contrary has not been established by proper and adequate testimony. Upon the whole, I am satisfied there can be no pretense for charging the sureties in the second bond with any part of Wigginton's defalcations.

Then, as to the high sheriff: it can not be denied, that Harrison executed the first bond without any fraudulent inducements held out to him by Lane; and I think it can not be denied, that when the sheriff and Wigginton his deputy qualified, the bond was a valid bond as to Harrison. It had been executed by him absolutely, and without expectation or assurance

that other sureties would join. His name was last, and he signed opposite to the only remaining seal; and it was more than a month after that the second bond was executed. The bond then was once a good and valid bond. How then has Lane forfeited his rights under it? Did he forfeit them by taking additional security for his own protection? I apprehend not. The very doctrines we have been considering, show that the creditor may take supplemental security, and security too that is only to be responsible in the last resort. The case of *Craythorne v. Swinburne* was just that case. But no authority can be necessary to establish a principle so plain. It seemed to be supposed, that he ought not to have taken the supplemental security with the qualification contained in the memorandum. But, *non constat* that he could have got the supplemental security without it; and was he to forego the additional security altogether, merely because he could not prevail on the parties to be co-sureties with, instead of being mere guarantors for, the prior sureties? I think not. It was then said, that he fraudulently suppressed his knowledge of the insolvency of the four first sureties, and his want of confidence in Wigginton. There can be no fraudulent suppression, where there is no obligation to give information. Now, I take it that when a man joins with others in a bond, it is his business to look to the conduct of the principal and the solvency of the co-sureties: it is not the business of the creditor; and though it may be benevolent and kind in him to put his surety on his guard, I am yet to learn that it is a duty which the law imposes.

Upon the whole, I am well satisfied, that the case has been rightly decided, and that the decree should be affirmed.

Decree affirmed.

Absent, BROOKE and BROCKENBROUGH, JJ.

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CONTRIBUTION BETWEEN CO-SURETIES.—The cases in this series on this subject are *Burrows v. Carnes' Adm'r*, 1 Am. Dec. 677; *McCormack v. Obannon*, 5 Id. 509; *Waters' Rep. v. Riley's Adm'r*, 18 Id. 303; *Moore v. Moore*, 15 Id. 523 and note; *Henderson v. McDuffee*, 20 Id. 557; *Mayor v. Ripley*, 25 Id. 175. Generally, when two or more official bonds are given for the faithful discharge of the duties of an officer, the last bond does not supersede the others, but the sureties in all the bonds are equally liable for the defaults of their principal while all the bonds are in force: *Postmaster-general v. Munger*, 2 Paige C. C. 189; *Corprew v. Boyle*, 24 Gratt. 284; *Lalla Bunsedhur v. The Bengal Government*, 14 Moore's Ind. App. 86. But there is no doubt that, as in the principal case, the sureties on the second bond may stipulate that their liability shall not exist if the former bond proves adequate; and a court may sometimes require the execution of a second bond, and provide

that, as a security, it shall be secondary to the former bond: *Glenn v. Wallace*, 4 Strob. Eq. 149. Generally, "where separate bonds are given with different sureties, and one is intended to be subsidiary to and a security for the other, in case of default in the payment of the latter, the sureties in the second bond would not be compellable to aid those in the first bond by contribution:" *Salysers v. Ross*, 15 Ind. 130; *Whitman v. Gaddie*, 7 B. Mon. 591; Brandt on Suretyship, sec. 224.

## FRENCH AND BROWN v. COMMONWEALTH.

[5 LEIGH, 512.]

UNDER THE STATUTE OF VIRGINIA, 1 Rev. Code, c. 82, sec. 7, in a *monstrans de droit*, or petition of right to an inquisition of escheat, the monstrant is plaintiff.

JUDGMENT OF AMOVEAS MANUS can not be rendered against the commonwealth in such proceeding, unless the monstrant show title in himself. TIME DOES NOT RUN against the commonwealth.

STATUTE OF VIRGINIA, 1 Rev. Code, c. 86, sec. 40, declaring entries on lands that have been settled for thirty years prior to the entry or location, etc., invalid, and releasing the commonwealth's title thereto, has no application to escheated land.

MARGARET and Patience Barnes, to whom the lot in dispute, situated in the city of Richmond, was conveyed by William Coutts, by deed dated September 1, 1783, died in 1791 and 1793, respectively, without heirs. These facts appeared by an inquisition of office taken by the escheator of Richmond. French and Brown filed a *monstrans de droit* in the circuit court of Henrico, in which, after taking oyer of the inquisition, and insisting that the matters therein contained were not sufficient in law, they claimed: 1. That on the day the inquisition was found, and for thirty years next before, they had been seized and possessed of the lot in dispute, and had during all that time paid the taxes thereon. 2. That the title of the commonwealth found by the inquisition accrued more than thirty years before the date of the inquisition, and that they, the monstrants, and those under whom they held, had been in possession of the lot for thirty years before the inquisition found, and had paid the taxes thereon. Both pleas concluded with a verification. The commonwealth interposed a general demurrer to the monstrance, and tendered a replication. French and Brown joined in the demurrer, but objected, that the commonwealth had no right to put in both a demurrer and replication; but the court ruled that the monstrants were the plaintiffs in the

proceeding, and received the replication. The demurrer was sustained, and judgment entered in favor of the commonwealth.

*Johnson*, for the appellants, cited *The Bankers' case*, 11 St. Tr. 154; *King v. Roberts*, 2 Str. 1208.

*Leigh*, for the commonwealth. The monstrants were plaintiffs, and it was incumbent on them to show title in themselves. They could not question the inquisition or impeach the right of the commonwealth, without showing their own right: *Sadler's case*, 4 Co. 55; *Reg. v. Mason*, 2 Salk. 447; *The King v. Bishop of Worcester*, Vaugh. 64; Bull. N. P. 215; 5 Bac. Abr., Prerogative, 574; 1 Rev. Code, c. 82, sec. 7, p. 295.

CARR, J. The effect of an office found for the king, is well settled by the old books: an office which finds that the king has a right to enter, makes the king a good title, though the office be false; and therefore, no man shall traverse the office, unless he make himself a title; and if he can not prove his title to be true, although he be able to prove his traverse to be true, yet his traverse will not avail him. Our law of escheats, after directing the manner in which the inquest shall be taken, enacts, that "if the inquisition be found for the commonwealth, and there shall be any man, that will make claim to the lands, he shall be heard without delay, on a traverse to the office, *monstrans de droit*, or petition of right. And the said lands or tenements shall be committed to him, if he show good evidence of his right and title, to hold until the right shall be found and discussed for the commonwealth, or for the party finding sufficient surety to prosecute his suit with effect, etc." It seems to me, that this statute settles all the points on which so much black-letter learning was expended in the argument. For example, there was much discussion upon the point, whether the monstrant is plaintiff or defendant. Now, the statute settles that, by saying, "he shall give surety to prosecute his suit with effect;" which a plaintiff only can do. Again, there was a good deal of argument upon the question, whether the monstrant could succeed by impeaching the title of the commonwealth. The statute shows that it was for no such purpose he was permitted to file his traverse, *monstrans*, or petition: It says, "if the inquisition be found for the commonwealth, and there be any man that will make claim to the lands, he shall be heard, etc.;" and it is this claim, not the title found by the office, which is to be discussed. This is further proved by the words, "if he show good evidence of his right, etc.,"



the land is to be delivered to him till this same right and title be discussed, etc. This seems to me the clear meaning of the statute; and puts to rest every question, except this, have the monstrants shown a good right and title to the land? It is equally clear to me that they have not. Their holding as against the commonwealth is nothing; for we know the maxim of *nullum tempus* applies to all such cases. But the commonwealth has chosen to relinquish her right to certain lands, under certain circumstances: 1 Rev. Code, c. 86, sec. 40, and the question is, are these lands embraced by that provision? "No entry or location, on any lands within this commonwealth, which have been settled thirty years, prior to the date of such entry or location, and upon which quit-rents or taxes, can be proved to have been paid, at any time within the said thirty years, shall be deemed valid; and any title which the commonwealth may be supposed to have thereto, is hereby relinquished." Any title which the commonwealth may be supposed to have thereto: whereto? Surely the answer must be—to the lands described in the former part of the section; that is, lands subject to entry and location. It is very clear, that escheated lands are not of that description, but of a class wholly different. I think therefore that the judgment must be affirmed.

CABELL and BROOKE, JJ., concurred.

TUCKER, P. The question, whether in a *monstrans de droit*, the monstrant is to be considered a plaintiff or defendant, has been very learnedly discussed. I do not think it necessary to decide it in this case, though I will incidentally observe, that if the *monstrans de droit* was a remedy at common law, which has been a moot-point from the time of old Staumford, 5 Bac. Abr. 571, the party appeared probably in the character of a defendant. For he was confessedly confined to the record which found the title of the king, unless his own title was by a record of as high a nature, which avoided the title found for the king: 4 Co. 55 b. He did not appear, therefore, in the character of a claimant, setting up a title unconnected with that found by the inquisition, but as a defendant, protecting himself from the title found, by showing other matter in avoidance. Hence it is, that the form of a *monstrans* is that of a plea, and that the answer to it was called a replication. But, when the party, at common law, had a title which did not appear in the inquisition, he was driven to his petition of right:

2 Tidd, 1132. The statutes of Edw. III. remedied this, and gave the *monstrans*, instead of the petition; and as the petitioner is in the nature of a plaintiff, so the party in a *monstrans de droit* is a plaintiff, wherever from the nature of his demand, he must have been a petitioner at common law; that is to say, wherever his title does not appear by the same record which finds the title for the king, or by a record of as high a nature, avoiding it. Claiming thus under a title not at all appearing on the inquisition, or connected with or arising out of the title found for the king, he could not obtrude himself as a defendant, but was at common law driven to institute an independent proceeding by petition, which has been substituted by the *monstrans de droit*, in which he sets forth his claim, and prays, that the hands of the king may be removed, the operation of the inquisition having been to put the king into the possession: See 2 Tidd, 1123.

Be this, however, as it may, the important question in this case is, whether the monstrent must succeed by the strength of his own title, or may succeed by showing that there is a defect in the title found for the commonwealth. This point has been expressly adjudged. The party can not have judgment, though the king have no title, unless he can show a title in himself: 2 Salk. 448; Vaugh. 64; 2 Tidd, 1123. This is equally clear, whether in this case he be plaintiff or defendant. If plaintiff, he must of course show title: if defendant, he has become such by his own act; he has not been called upon to defend himself; he has interpleaded of his own accord; he has obtruded himself into the cause, and he can only be received to do so, by showing an interest in the event. This is a familiar principle in our jurisprudence. It would be monstrous were it otherwise. It would be an outrage to permit any person who pleased, without a shadow of interest, to enter the lists against a claimant in a court of justice. I know of no exception, but the case of an *amicus curiæ*, whose rights are of the most circumscribed character: 2 Inst. 178. He can neither appeal nor have a *supersedeas* or writ of error: *Dunlop v. Commonwealth*, 2 Call, 284. Nor can any other person, unless he shows himself interested in the controversy: *Sayre v. Grymes*, 1 Hen. & M. 404; *Wingfield v. Crenshaw*, 3 Id. 245. And in the case of *Dunlop v. Commonwealth*, it is moreover expressly decided, that an *amicus curiæ* can not move to quash an inquisition of escheat, unless he either has an interest himself, or represents somebody who has. In the case of *The King v. The Bishop of Worcester*, Vaugh. 64, it is said: "If the

king be once seised " (which he generally becomes upon finding an inquisition of escheat), " his highness shall retain against all others who have not title, notwithstanding it be found, also, that the king had no title, but that the other had possession before him; as appeared in 37 Ass., pl. 11, where it was found, that neither the king nor the party had title, and yet adjudged that the king should retain: for the office that finds the king to have a right or title to enter, makes ever the king a good title, though the office be false, etc., and therefore no man shall traverse the office unless he make himself a title. And if he can not prove his title to be true, although he be able to prove his traverse to be true, yet this traverse will not serve him:" See also 16 Vin. Abr., Office or Inquisition, G, 4, pl. 8, citing Brooke, *Traverse de Office*, pl. 48.

Resting upon these authorities, I am of opinion, that the court can not give the judgment prayed for, of *amoveas manus*, unless a title is shown by the appellants. They admit by their plea, that they have been removed, and they now ask to be restored to the possession. The question then recurs, do they show a title to the property which justifies their demand of judgment? The showing possession is not sufficient proof of title, though possession, indeed, is one of the ingredients of title. For, according to the authorities just cited, the party was not entitled to judgment, where it appeared that neither the king nor the party had title, and though it was found that the party had the possession first. Again, it is the received doctrine of all the books, that when the possession is vacant, the inquest *ipso facto* vests the possession in the crown; but if not vacant, a *scire facias* is necessary on the part of the king; a pregnant proof, that the possession does not stand in the way of the inquisition, though it puts the king upon the necessity of calling on the party in possession to show cause why he should not surrender that possession. Nor is there anything hard or improper in this, for though possession is a good title against all others than the commonwealth, yet as she is the owner of all the lands which have no other owner, it can never be sufficient to set up a bare possession against her, nor can any justly complain whose only title is a naked possession.

Then as to the title set up by the appellants: it depends altogether on the construction of the statute, 1 Rev. Code, c. 86, sec. 40. To pursue the ingenious course of reasoning of the counsel for the appellants, in his commentary on this statute, would lead me into unnecessary detail. I shall therefore

content myself with saying, that I consider the statute as having no application to the case of escheated lands; and that the intrusion upon them, though followed by a possession of more than thirty years, can not be converted into a good title against the commonwealth, by the operation of that provision.

I am of opinion, that the judgment be affirmed.

Absent, BROCKENBROUGH, J.

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## BROWN'S EX'R v. HIGGINBOTHAM & Co.

[5 LEIGH, 583.]

**PARTNERSHIP IS ESTABLISHED BY PROOF** of an actual community of interest, accompanied by an agreement to participate in the profits, and contribute to the losses of the concern.

**LEASING OF A FARM BY ONE PERSON** and placing men to work thereon by another, under the former's management, upon an agreement that the net profits, after deducting all expenses, shall be divided between them, constitutes a partnership between such parties.

**PAYMENT BY ONE PARTNER OF DEBTS** of the partnership with money held by him as agent of another, makes all the members of the partnership liable to the latter for the amount so paid, although such payment was made after the partnership had been dissolved.

**UNTIL THE AFFAIRS OF A PARTNERSHIP** are settled, and outstanding engagements made good, it continues in legal contemplation, so far, at least, as respects winding them up.

**BILL** in chancery by Higginbotham & Co. against Robertson, executor of J. Brown and C. Powell, alleging that Brown in his life-time and Powell leased a farm of Sophia Crawford for a term of years, and cultivated the same in partnership and divided the profits; that Powell was the agent and manager for plaintiffs in a mercantile business, carried on by them in the vicinity of the farm; that the partnership of Brown & Powell were indebted to plaintiffs in the sum of three hundred and sixteen dollars for goods furnished and money paid by them on account of the partnership; that the debt consisted of money paid to Mrs. Crawford for rent, and to the overseer of the farm for wages, paid by Powell from plaintiffs' money and charged by him to the partnership, and also for goods furnished; that Powell was insolvent, and Brown having died, they were entitled to have the debt paid out of Brown's estate. Robertson answered that his testator had informed him that Powell leased the farm of Mrs. Crawford for three years; that in the third year he, Brown, placed a number of men on the farm

under Powell's management, and was to receive two thirds of the net profits of the farm after deducting all expenses; that Powell had received the proceeds from the crops raised, and had paid the rent, but had failed to account with Brown for the balance. The answer upon this information denied that Powell had any right to contract debts binding on Brown. The bill was taken *pro confesso* against Powell. It appeared from the evidence that Powell had leased the farm and given security to pay the rent, and that after the lease was made, the partnership between Brown and Powell was formed. That Powell had paid the rent due Mrs. Crawford and the overseer's wages out of plaintiffs' funds, by giving them credit respectively on their accounts with plaintiffs for the amount due them from Brown and Powell; but the entries of these payments were made on plaintiffs' books by Powell's direction after the firm of Brown & Powell had dissolved. Judgment in favor of plaintiffs.

*Garland*, for the appellant.

*Stanard*, for the appellees.

TUCKER, P. The only question of any difficulty in this case, I think, is as to the existence of the partnership; and I am of opinion, that the evidence sufficiently establishes it. Partnership is "a contract between two or more persons for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement to divide the gain or loss proportionably between them:" Wats. on Part. 1. It is not confined to mercantile speculations or adventures, but may exist between mechanics, attorneys, carriers, or farmers: *Coope v. Eyre*, 1 H. Bl. 37. Its existence is established by proof of an actual community of interest, accompanied by an agreement to participate in the profits, and contribute to the losses of the concern. Such proof places beyond question the liability of the partner; but even without it, a party may be charged as partner, where he appears and exhibits himself to the world, as a person connected with the partnership, and as forming a component member of the firm. In this case, however, I do not think the evidence fixes upon Brown the character of a nominal partner; that is, of one who, without an interest in the concern, allows his name to be used, and holds himself out to the world as having an apparent interest. It must be admitted, I think, that Brown is not chargeable, unless such an actual interest can be shown in him, as constitutes a partnership; for as to the loose declarations and opinions of witnesses, that he was al-

ways considered a partner, they are to be very cautiously received, because of the danger of establishing so important a contract upon so weak a foundation. However, Brown's interest is proved.

To establish it, it must be shown, that the parties have joined together their money, goods, labor or skill, or either or all of them, upon an agreement to participate in the profits, from which is also implied by law, a liability for the losses; for no stipulation can protect a party who receives the profits, from a corresponding responsibility for losses: *Ex parte Hamper*, 17 Ves. 412. I think it can not be doubted, that these parties did join together their property, labor, and skill. The defendant acknowledges, that Brown told him, "he placed under the management of Powell a certain number of hands." Here, then, was an union of the property of Brown, with the management of Powell. Moreover, they were placed on a farm, of which Powell was the lessee. He thus brought into the concern his skill and labor, and his lease also, and Brown brought in his slaves.

It is proved, that Brown, in speaking of these transactions, recognized the partnership in the farm; and the overseer deposes, that Brown took an interest in the farm, which justified the belief that he was a partner; that he frequently visited it, and inquired about its progress, and as the witness thinks, said, in his presence, that he was in partnership with Powell in the farm. With this testimony, I do not perceive how we can question the fact that there was an union of the property on the one hand, and of property and attention on the other, between these two parties; and this too, with a distinct admission by each, of the power of the other over the affairs of the concern; for Brown admitted that he had placed his hands under the management of Powell; and Powell has abundantly admitted Brown's interest, and, of course, his powers as a partner. It is, indeed, worthy of remark, that Brown did not tell the defendant Robertson, that he had hired his slaves to Powell, but that he had put them under his management. This implies, that he also still retained control over them. If he did so, it must either have been as partner, which is the matter to be proved, or as owner, in which case his liability would be unquestionable, as Powell, in this view, would be only his agent. Then, was there an agreement to participate in the profits? This is, in effect, admitted; for Brown told the defendant Robertson, that he was to receive two thirds of the net proceeds of the

crop, deducting all expenses. Now, the profits were precisely the net proceeds of the crop, after deducting all expenses; therefore, he was to receive two thirds of the profits. If he had bargained to receive two thirds of the crop, without regard to the expenses, some doubt, perhaps, might be thrown over the question; but as the expenses were first to be deducted, it is obvious that he was not only to participate in profits, but to be affected by losses; for if the expenses exceeded the crops, he was to get nothing. Moreover, being thus entitled to profits, and affected by losses, he could not limit or contract that liability, so as to affect third persons. For, even if it had been expressly agreed, that he should not be affected with losses, farther than the whole amount of the crop, that agreement would not have absolved him from a further liability, so far as third persons were concerned: Gow on Part. 19, 20.

If there was a partnership in this case, I think the decree is manifestly right. It is objected, indeed, that Mrs. Crawford's rent was not properly chargeable against the partnership. I can not think so. By the agreement, Brown was to have two thirds, deducting all expenses. The rent under the lease was one of those expenses. By the agreement, then, the rent was to be paid out of the crops of the concern. The lease was brought into the concern by Powell. Though he was the original renter, yet when he formed the partnership, the lease was in effect assigned to the partnership. Admitting the partnership, this is obvious; and if so, then, as assignees, the partners were liable to the lessor. Powell was no longer the tenant, but Powell and Brown, as partners, were tenants; and as terre-tenants they were responsible for the rent, and it has been properly charged against the firm, by Higginbotham & Co., who paid it. In this aspect, it is perfectly unimportant, when the entry was made, since the partnership was liable for the amount. The same remark applies to the wages of the overseer, which being a fair charge against the firm, it was entirely unimportant when the entry was made. Both debts were due either to Mrs. Crawford and the overseer, or to Higginbotham & Co., who had paid them; and as Higginbotham & Co. paid them by direction of one of the firm of Brown & Powell, though after its dissolution, it can not be regarded as an officious payment. For until the affairs of a partnership are settled, and outstanding engagements are made good, the partnership must in legal contemplation have a continuance, so far at least as respects winding

them up: Gow, 312 [287]; 15 Ves. 226, 227; 16 Id. 57; 1 Swans. 480.

As to the forty-two dollars due from Mrs. Crawford to Brown, it is obvious that he could not have set off this debt at law, even against her. But whether he could do so or not in equity, I am of opinion, that as Higginbotham & Co., at the instance of Powell, paid off the whole one hundred and seventy dollars to Mrs. Crawford, they are not liable to the set-off at law or in equity.

I do not perceive, that Powell's being the agent of Higginbotham & Co. makes any difference in the case. As their agent he bound them, indeed, by his acts, and therefore they can not now gainsay the credits to Mrs. Crawford and the overseer, though they should lose the amount. But he was also partner of Brown, and when he took up goods for the firm, or paid debts of the firm out of Higginbotham & Co.'s funds, he was certainly acting for himself and partner, and the firm is chargeable accordingly. Upon the whole I am of opinion, that there is no error in the decree, and that it must be in all things affirmed.

The other judges concurred.

Decree affirmed.

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## HINCHMAN v. LAWSON.

[5 LEIGH, 695.]

**BURDEN OF PROOF RESTS UPON THE DEFENDANT** in an action of slander, where he is charged with saying that an affidavit made by plaintiff was false, and to which he pleads justification, to show that the affidavit was untrue, and not upon the plaintiff to show that it was true.

**ACTION** of slander brought by Hinchman against Lawson, for saying that the statement contained in an affidavit sworn to by Hinchman, "that Lawson had engaged to pay certain taxes if they could not be collected from Green's heirs," was false, and that it was all a lie. Lawson pleaded not guilty, and special pleas avowing the words, and justifying them. Issues were joined on these pleas. At the trial plaintiff contended and moved the court to instruct the jury that the defendant was bound to prove the truth of his pleas of justification; that is, that Hinchman's affidavit, "that Lawson had engaged to pay the taxes," etc., was false. Defendant contended that plaintiff was bound to prove his statement in the affidavit true, and the court so held and refused to instruct the jury as requested by



plaintiff. Verdict and judgment for defendant. On petition plaintiff was allowed a *supersedeas*.

*C. Baldwin*, for the plaintiff in error.

*Summers, contra.*

TUCKER, P. It was a question of the deepest interest at the trial, on whom the *onus probandi* lay. Hinchman had sworn, that Lawson had made a certain engagement to pay Green's taxes. Lawson denied it, and charged Hinchman with perjury. Both were under equal difficulty. If, as I presume, the engagement by Lawson had been made without the privity of any other person than Hinchman, it was impossible for Hinchman to prove the truth of what he had sworn. On the other hand, it was equally difficult for Lawson to prove the negative. Availing himself, therefore, of the general principle, that he who holds the affirmative in issue, must prove it, and that no man shall be called upon to prove a negative, he resisted a motion to instruct the jury, that the burden of proof was on himself, and insisted that it was on his adversary. And the court decided, that the burden of proving the truth of the statement in the affidavit, lay on the plaintiff. As might be expected, the plaintiff could not prove what was probably a private conversation between the defendant and himself; and the jury, of course, found a verdict for the defendant. Was the instruction right that led to this result?

The rule is not universal, which forbids the proof of a negative to be thrown upon a party. It is, indeed, generally true, that the *onus probandi* lies upon that party who has the affirmative of the issue; a rule founded upon the difficulty, in most cases, and the impossibility in some, of proving a negative. But to this general rule, there are well-established exceptions. One of these is, that where the negative involves an affirmative, the burden of proof will rest upon either the one or other party, according to other principles, and without reference to the mere formal character of the negation. Such are the cases of the pleas of infancy, fully administered, beyond the sea, and such like. Though the denial of these allegations seems to involve a negative, yet that negative has a corresponding affirmative; namely, that the defendant was of full age—that he had assets—that he was in the country. Accordingly, the question as to the *onus probandi*, in relation to them, is not settled with reference to the difficulty of proving a negative, since either may sustain himself by proof of an affirmative.

There is another exception to the general rule. It is, that when the negative involves a criminal omission in the party, and consequently where the law upon its general principle presumes his innocence, the affirmative of the fact is presumed, and the onus is thrown upon the party alleging the criminal omission: 1 Stark. Ev., pt. 3, pp. 378, 379. To this effect, there have been some very strong cases in the English books. Thus, in a suit for tithes, it was held, that the defendant was bound to prove the negative allegation of his plea, that the plaintiff had not read the thirty-nine articles. So, where the plaintiff declared against the defendant who had chartered his ship, for having put on board an inflammable commodity, without notice to the master or other person of its nature, whereby the ship and cargo were burned, it was held that the plaintiff was bound to prove this negative, viz., the want of notice: *Williams v. East India Company*, 3 East, 192. So, when a servant has been in the habit of receiving money, and paying it over to his master without vouchers, the presumption is said to be, that he pays over all that he receives, and it has been held, that the master must not only prove that he has received the money, but that he has not accounted for it: *Evans v. Birch*, 3 Camp. 10. In *Williams v. East India Company*, Lord Ellenborough cites the case of *The King v. Coombs*, Comb. 57, where the defendant swore an affirmative, and an information was exhibited against him for it: and although the negative could not be proved, yet the court directed, that the prosecutors should first give their probable evidence, and that the defendant should afterwards prove the affirmative, if he could. So, in the present case, if the oath had been given in a judicial proceeding, and Hinchman had been indicted for perjury, the negative must have been proved, or he must have been acquitted; and had Lawson been dead, or been indorsed as prosecutor, and thereby disqualified, that must have been the result. Here, then, are cases, and strongly analogous cases, in which the negative is required to be proved. Let us see what would be the reasonable doctrine in this case.

Hinchman is here charged with perjury. The presumption of the law is in favor of his innocence, until there is evidence produced of his guilt. The evidence of his innocence, peradventure, may not only not now be in his power, but may never have been so. The communication of Lawson may have been made when no other person was present. He, therefore, would have as much difficulty in proving the affirmative, as Lawson in

proving the negative. In this state of things, it is most reasonable to throw the burden upon him who has undertaken to charge another with an infamous crime. It is for the peace and happiness of society, that no man who takes upon himself to make such a charge, should be exempted from the necessity of proving it. If he knows he can not prove it, it is incumbent on him to be silent, or at most to meet the allegation of the fact by a bare denial. If, however, he quits the path of prudence and propriety, and charges his adversary with perjury, in consequence of which he is subjected to his action, if he can not prove his justification, he must submit to a verdict for damages. If his adversary has no character, those damages will be nominal, but if, on the other hand, he is a man of fair character, is it reasonable that his oath should be discredited, merely upon a denial of the truth of what he has sworn? That he should be branded as perjured, by a verdict for the defendant on the plea of justification, without a tittle of evidence to sustain the charge? I think not. If he can not be convicted of perjury on an indictment without evidence, no more should he be convicted of it in this action, upon the mere allegation of the defendant that he did not say what the plaintiff had sworn to. The consequences of a contrary doctrine, would be monstrous. Every witness who testifies to words uttered in his presence alone, would be liable at once to the foulest charge of perjury by the defendant, without any hazard, on his part, of incurring the penalty of his calumnies. The only redress of the injured party, in such a case, would be a resort to that kind of personal appeal, which it has been peculiarly the policy of the law to prevent.

Upon the whole, I am of opinion, that the instruction of the court was improper, and that the cause must go back for a new trial. The pleas are also somewhat informal and defective; but these may be amended before another trial.

The other judges concurred. Judgment reversed, and cause remanded for a *venire de novo*.

Absent, BROOKE and BROCKENBROUGH, JJ.

AM. DEC. VOL. XXVII—40

CASES  
IN THE  
SUPREME COURT  
OF  
ALABAMA.

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TERRY v. ESLAVA.

[1 PORTER, 273.]

MEASURE OF DAMAGES UPON THE BREACH of a contract not to use cotton presses for compressing cotton, is the injury sustained, and not the consideration paid for entering into such contract.

TRESPASS on the case brought by Eslava against Terry for using certain cotton presses for compressing cotton in violation of a contract not to do so. The other facts are stated in the opinion.

*Goldthwaite*, for the plaintiff in error. The court charged the jury that the measure of damages was the consideration money of the contract. We contend that the damages actually sustained are the measure; 9 Com. L. 204; 4 Id. 204; 6 Wheat. 109, 118.

*Elliott, contra*, cited 7 Johns. 72; 2 Dall. 252; 1 Stew. 125.

By Court, THORNTON, J. This was an action of trespass on the case, brought by writ of error from the circuit court of Mobile county; and the error presented for our consideration, is the charge of the court as contained in the bill of exceptions, respecting the criterion of damages. These are alleged to have accrued from the breach of a parol contract, whereby the plaintiff in error, *inter alia*, bound himself, in consideration of a certain sum of money, which seems to have been paid, not to use, or permit to be used, certain presses for compressing cotton, in the city of Mobile. It was assumed by the

court below, that the consideration paid was the proper measure of damages, in case the jury should believe that the contract had been violated. Now, the consideration of a contract may, or may not, be the amount which a party is entitled to recover, in case of its breach. Where the contract provides by way of stipulated damages, that the consideration shall be the amount recoverable, those damages, thus ascertained, will not be disregarded, although in point of fact, they may be greater or less than the sum thus agreed upon. In the case presented, we do not consider that there has been any stipulation, regulating the amount of damages which the plaintiff in error shall pay, in the event of a breach on his part; and, however, from the nature of the subject-matter of the contract, the ascertainment of them may be difficult; yet that difficulty can not be overcome or obviated by a resort to the consideration, as their just criterion. There surely was a benefit proposed to accrue to the defendant in error from the non-user of the cotton presses by the plaintiff. The actual benefit which might accrue, would of course depend upon a variety of contingent circumstances; so, the injury which he has sustained, is to be estimated, in the absence of any express stipulation, by a reasonable consideration of all the circumstances appertaining to the matter. And although there may be difficulty in determining on the damages ensuing from the breach, it is intrinsic in the subject about which the parties have chosen thus loosely to contract. The case is not so molded by the pleadings, as to present the question of a rescission of the contract; in which case, to reduce the parties *statu quo*, the consideration paid would be sought to be recovered back; but damages alone are demanded, for an alleged breach of an unrescinded contract; which, as we think, may be either greater or less, according to the circumstances proved, than the consideration paid by the defendant in error.

For these reasons the judgment is reversed, and the cause remanded.

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MEASURE OF DAMAGES FOR BREACH OF CONTRACT.—See generally, *Jackson v. Le Grange*, 10 Am. Dec. 237; *Miller v. Mariner's Church*, 20 Id. 341; *Turnworth v. Moore*, Id. 479; *Holley v. Miz*, Id. 702; *Dey v. Dox*, 24 Id. 138.

**GEE'S ADM'R v. WILLIAMSON, FOR USE OF  
NICHOLSON.**

[1 PORTER, 313.]

**DEFAULT ON THE PART OF A PERSON** to pay the debt of another to a certain bank in installments in pursuance of a written agreement to that effect, can not be proved by the record in a suit brought by such bank against both of such persons and another on a note signed by them, in which an execution was issued against all three and returned "satisfied," the note being for a less amount than the debt agreed to be paid and due at a different and subsequent time.

**WHATEVER IS ONCE ESTABLISHED** between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case.

**WHERE A NOTE, THE CONSIDERATION** of which fails by reason of the fraud of the payee, is assigned to a third person for value, a right of action to the extent that the consideration fails, accrues to the latter immediately upon the assignment, and he may, in an action against him by the payee, set off such cause of action without waiting to have such failure of consideration established by record evidence.

**WHERE THE CONSIDERATION OF A NOTE FAILS IN PART** by the fraud of the payee, who indorses it to a third person for value, he is not entitled to demand and notice to render him liable to the extent to which the consideration fails.

**TRESPASS** on the case brought by Williamson for the use of Nicholson against Gee on a contract in writing, signed by the latter, acknowledging the receipt of eleven hundred dollars, the amount of a debt due from Williamson to the St. Stephens bank, and promising to pay the debt as it should become due. The other facts are stated in the opinion.

*Goldthwaite*, for the plaintiff in error.

*Stewart*, *contra*.

By Court, THORNTON, J. This cause was once before brought up by writ of error to this court; and was reversed and remanded: 2 Stew. 512.

The declaration contains, in addition to the common counts in assumpsit, one upon a writing of the intestate of the plaintiff in error, described in said count as an agreement or writing, dated the fourteenth of March, 1821, under his hand, acknowledging that he had received of the defendant in error, Williamson, the sum of eleven hundred dollars, which was the full amount due by said Williamson in the St. Stephens bank, which said sum of eleven hundred dollars, the said intestate,

in the aforesaid certain writing or agreement, undertook and promised said Williamson to pay, into the St. Stephens bank, as the several installments of the said eleven hundred dollars should become due. This special count concludes with the breach: "Yet the said Joseph Gee (the plaintiff's intestate), not regarding his promise and assumption so by him made as aforesaid, has not paid the said sum of eleven hundred dollars into the St. Stephens bank, as the several installments in said bank, on that sum, fell due," etc. The error assigned is, that the court erred, as stated in the bill of exceptions.

Upon examining the bill of exceptions, we find two matters excepted to: 1. The admission of a record of the circuit court of Washington county, of proceedings had in that court in favor of the Tombeckbee bank, which discloses a judgment had against the *cestui que use* in this action, on a note for nine hundred dollars, payable to the said institution, dated on the twenty-third day of March, 1821, and signed by J. W. Williamson, Joseph Gee, and said Theophilus Nicholson. The exemplification further shows, that on this judgment an execution issued against all the said obligors, which is returned by the sheriff, "satisfied," generally, without specifying who paid it. The bill of exceptions states this ground of error thus: "On the trial of this cause, the plaintiff offered in evidence, the exemplification annexed, and marked A, to prove a default by the defendant's testator, in his contract as declared; to which the defendant objected, and the court admitted the same."

If the just import of this language is, that the record offered constitutes proof of a default in performance of his contract, by the intestate (which is not a very strained construction), there can be no doubt that the exception was well taken; for the defendant's intestate was no party to those proceedings, and should not be concluded by them, as to the matter of his performance of his contract, even though they were had, upon the same debt to the bank, which his contract had bound him to discharge. But not preceded by, or at least not accompanied by any explanatory testimony, this record was not only no evidence of a default, but was wholly inadmissible as any evidence at all. The contract declared on, is of the fourteenth March, 1821, and binds the defendant's intestate to apply a certain sum of money to the discharge of that amount, then due by the said Williamson to the St. Stephens bank, as the several installments thereof may become due. Now the note to the bank, which is the foundation of the record and proceedings admitted

as testimony, is the note of the said Williamson, Nicholson, and intestate, for the sum of nine hundred dollars, dated the twenty-eighth of March, 1821, and payable ninety days thereafter. For this cause, without more, the judgment should be reversed.

As, however, the matter of the other exception, touching the effect of the record designated B, in the bill of exceptions, may be agitated again, in any new trial which may take place, we feel called upon to decide in relation to it also.

This record is voluminous, but a short statement of its prominent features will suffice. It appears from the exemplification, that some time before the institution of this action, Williamson, the defendant in error, had assigned to the intestate Gee, a promissory note upon one Shaw. Judgment being had thereon at common law, Shaw filed a bill in equity, praying an injunction, which was granted also, before the issuance of the writ in the cause before us. This bill, which made both Williamson and the intestate Gee, parties defendants, sought relief on the ground alleged of fraud in the consideration of said note, practiced by the said Williamson, occasioning a failure thereof. After many things done in the progress of this chancery cause, which are deemed unnecessary to be noticed, a final decree was pronounced in April, 1825; which (after reciting, that in conformity to orders theretofore made, the cause was heard *ex parte* as to Williamson, on the bill, answer of Gee and the testimony), perpetuated the injunction, and decreed the costs against Williamson. The defendant in the court below, introduced this record, under the plea of set-off; and the court charged the jury, that it was necessary for him "to prove a demand and notice to the plaintiff, to fix his liability as indorser, or that there was a failure of the consideration of said note, which facts, nor either of them, could be proved by the said exemplification"—which charge is assigned for error.

This cause having on a former occasion been before this court, it behooves us to examine, what principles were then settled; for it is well established, that whatever has been once established in this court, between the same parties, in the same case, continues to be the law of the case, whether orthodox or not, so long as the facts, of which such legal principles were predicated, continue to be the facts of the case. We are not authorized to presume that this record is not the same which was offered on the former trial. We will not suppose that there were two of perfect similitude, and that this is that other, and not the one formerly attempted to be used under the plea of set-



off. Then as I apprehend, the effect of this very record has been settled by the former opinion of this court; so far at least, as to conclude one of the grounds charged by the court, as not proved by the exemplification—that is, the failure of consideration. But if the former opinion should be considered as only settling the admissibility of this proceeding, notwithstanding that its admissibility is deduced in that opinion, mainly, from a consideration of its effect; yet I would consider the charge to be erroneous.

Without proof, that the terms of this assignment were such as to prevent it, I think a right of action accrued to the intestate, Gee, immediately upon the transfer of the note upon Shaw; for at that very time, the consideration of the assignment had failed, and a liability arose, to the extent at least, to which the transferred note was rendered void by the fraud of Williamson.

It is true that record evidence did not then exist of this failure of consideration; but the doctrine on this head, is not that nothing shall be used as a set-off, the proof of which transpires after action brought, but that the right to set-off as a debt due only, shall have been acquired before that time. Now this note upon Shaw had been assigned, and its collection enjoined by the fiat of a chancellor, prior to the institution of the present action; and its consideration had also failed, though the conclusive evidence of that fact, which this record discloses, was not then in existence. As to the demand and notice, it is only suggested in the charge as an alternative requisition, admitted very properly to be unnecessary where failure of consideration appears. The payee of a note, indorsing it, is like the drawer of a bill of exchange, and the maker like the drawee. Now, want of funds, or authority to draw, supersedes demand and notice.

Let the judgment be reversed, and the cause remanded.

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STARE DECISIS, ET NON QUIETA MOVERE.—To stand by precedents, and not to disturb settled points: Peloubet, Legal Maxims, p. 284; Tayler, Law Glossary, 501. "This phrase expresses the policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations. The doctrine is frequently termed the rule of *stare decisis*; and is, in general, that, when a point has been once settled by decision, it forms a precedent which is not afterwards to be departed from:" Abb. Law Dict. p. 497. The supreme court of New York, speaking of this maxim, says: "The decisions of this court, while unreversed, always formed the absolute law of the case, and entered with very decisive effect into the body of precedents. They must, from the nature of our legal system, be the same to the science of the law, as a convincing series of experiments is to any other branch of inductive philosophy. They are, on being promulgated, immediately relied upon according to their character, either as confirming an

old or forming a new principle of action, which, perhaps, is at once applied to thousands of cases. These are continually multiplying throughout the whole extent of our jurisdiction. Numerous and valuable rights, offensive and defensive, may be claimed under them. \* \* \*

"Independent of this statute, Sir William Jones has written an excellent commentary on the maxim, *stare decisis*, etc., by way of reply to a remark of Powell, J., who said, 'nothing is law that is not reason.' 'This is a maxim,' says Jones, 'in theory excellent, but in practice dangerous, as many rules, true in the abstract, are false in the concrete; for, since the reason of Titius may, and frequently does, differ from the reasons of Septimius, no man who is not a lawyer, would ever know how to act, and no man who is a lawyer, would in many instances know how to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate.' Jones on Bail. 60. The court almost always, in deciding any question, creates a moral power above itself; and now, when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case." *Bates v. Relyea*, 23 Wend. 340, 341.

Kent, in that portion of his Commentaries in which he considers the sources of municipal law, thus refers to the binding authority of precedents upon questions of law: "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." 1 Kent. Com. 475, 476. See also, *Goodtitle v. Otway*, 7 T. R. 419; *Butler v. Duncomb*, 1 P. Wms. 452; *Fletcher v. Lord Sondes*, 3 Bing. 588; *Selby v. Bardons*, 3 Barn. & Adol. 17; *Giblin v. Jordan*, 6 Cal. 416; *Welch v. Sullivan*, 8 Id. 188; *Piercy v. Sabin*, 10 Id. 30; *Clark v. Troy*, 20 Id. 224; *Pioche v. Paul*, 22 Id. 109; *Hihn v. Courtis*, 31 Id. 401; *Vassault v. Austin*, 30 Id. 696; *Smith v. McDonald*, 42 Id. 484; *Lindsay v. Lindsay*, 47 Ind. 286; *Day v. Munson*, 14 Ohio St. 488; *Boon v. Bowers*, 30 Miss. 256; *Emerson v. Atwater*, 7 Mich. 23; *Reed v. Ownby*, 44 Mo. 206; *Kneeland v. Milwaukee*, 15 Wis. 691; *Willis v. Owen*, 43 Tex. 48. This maxim contemplates, however, only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record, or on points not necessarily involved therein. Such expressions, being *obiter dictum*, do not become precedents: *Wells on Res Adjudicata* and *Stare Decisis*, sec. 583; *Cohens v. Virginia*, 6 Wheat. 399; *Ex parte Christy*,

3 How. (U. S.) 322, Catron, J., dissenting opinion; *Peck v. Jenness*, 7 Id. 612; *Carroll v. Carroll*, 16 Id. 287; *Pass v. McRae*, 36 Miss. 148; *People v. Winkler*, 9 Cal. 236.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated:" *Cohens v. Virginia*, 6 Wheat. 399. This limitation should not be carried too far, however. Because a point has not been fully argued, a decision upon it is not necessarily *obiter dictum*, and therefore not binding as a precedent. If in the determination of a case it is necessary to consider and determine a particular point, and the court does carefully consider it and deliberately pass upon it, that is all that is necessary to make such decision a binding authority in subsequent cases: Wells on Res Adjudicata and Stare Decisis, sec. 582; *Alexander v. Worthington*, 5 Md. 488; *Michael v. Morey*, 26 Id. 261. In the two latter cases it is said that all that is necessary to render a decision binding as a precedent in Maryland is, that the point involved was "investigated with care and considered in its fullest extent." Another limitation on the doctrine of *stare decisis* is, that more is necessary to constitute a decision a precedent than merely that the doctrine for which it is cited is announced or stated in it. "It is a fundamental law, that a precedent must be a conclusion, a decision in a cause, and not a process of reasoning, an illustration, or analogy. These latter are but means of arriving at a decision, and it is not at all uncommon for the members of a court to be fully agreed as to the conclusions arrived at, but yet to differ very materially as to the reasons and principles whereby the conclusions are sustained in the written opinions:" Wells on Res Adjudicata, sec. 583; *Lucas v. Com.*, 44 Ind. 541. Consequently the language used in an opinion, whether in the reasoning or the conclusion established thereby, is always to be explained and restricted by the case under consideration, and to that extent only is a decision fitted to serve as a precedent: Id., sec. 584; *Pass v. McRae*, 36 Miss. 148; *People v. Winkler*, 9 Cal. 236. So a single decision upon any point is not regarded as conclusive as a precedent, as a series of decisions upon that point would be: *Duff v. Fisher*, 15 Cal. 382; *Butler v. Van Wyck*, 1 Hill 438, Bronson, J., dissenting opinion; Wells on Res Adjudicata and Stare Decisis, secs. 589, 599. But see *Hihn v. Curtis*, 31 Cal. 402.

**AFFIRMANCE OF JUDGMENT BY DIVIDED COURT ESTABLISHES NO PRECEDENT.**—Where, in an appellate court, the decision of an inferior court is affirmed by a bench equally divided in opinion, no binding precedent can be thus established. In such a case, there has been an adjudication: the judgment of affirmance determines, and is as conclusive upon the rights of the parties to the judgment as any other; yet it is not considered as settling the questions of law as to cases which may arise between other parties: *Elting v. U. S. Bank*, 11 Wheat. 78; *Morse v. Gould*, 1 Kern. (N. Y.) 285; *Bridje v. Johnson*, 5 Wend. 342; *People v. Mayor etc.*, 25 Id. 232; Wells on Res Adjudicata, sec. 585.

**RULES OF PROPERTY NOT DISTURBED, THOUGH FOUNDED ON ERRONEOUS PRECEDENTS.**—The final settlement of certain questions of law often becomes

of more importance than how they are settled, and among these are rules of property long recognized and acted upon and under which rights have vested. Where a rule of property has been settled by a court of final resort, after a thorough contest and upon mature consideration, it should not be deemed open to further controversy, although it may have been established upon an erroneous construction of the law. Upon the stability of judicial decisions reposes the security of property, and when a change would produce a confusion in titles, it is rarely, if ever, made. Thus says the supreme court of Missouri, *per* Wagner, J.: "The counsel for the plaintiff admits that these authorities are directly against him, but asks this court to review the question and determine the law otherwise. This we are not at liberty to do. The law has been settled for many years; it has become a rule of property, and titles have been vested on the strength of it. Under such circumstances, the error would have to be most palpable to justify this court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as on them reposes the security of property; and they are not to be tampered with to suit the views of different persons. I am aware that there are to be found most respectable cases in other states holding a doctrine somewhat different from the rulings of this court; and were the question *res novo*, they might be entitled to serious consideration. But it is no longer debatable or open, and we are unwilling to unsettle our own laws because some other courts have entertained different views." *Reed v. Ownby*, 44 Mo. 206. Similar views are also expressed in the following cases: *Snyder v. Gascoigne*, 11 Tex. 455; *Rockhill v. Nelson*, 24 Ind. 424; *Harrow v. Myers*, 29 Id. 470; *Hihn v. Courtis*, 31 Cal. 402; *Pioche v. Paul*, 22 Id. 110; *Lion v. Burtiss*, 20 Johns. 487. Mr. Wells states the following as grounds that will justify a departure from a decision which has become a general rule of property: 1. The necessity of preventing continued injustice. 2. The necessity of vindicating clear and obvious principles of law. Where these do not exist, a proposition for change can not be entertained: Wells on *Res Adjudicata* and *Stare Decisis*, sec. 598. See *Kneeland v. Milwaukee*, 15 Wis. 691.

"THE LAW OF THE CASE."—It is well settled that all questions of law, determined in a case on appeal, to a court of final resort, must govern the case in all subsequent steps, both in the trial and appellate courts. They become the law of the case, and are seldom, if ever, reversed or set aside in any subsequent stages of that case, although they may appear to be erroneous: *Dewey v. Gray*, 2 Cal. 374; *Davidson v. Dallas*, 15 Id. 82; *Phelan v. San Francisco*, 20 Id. 45; *Page v. Fowler*, 37 Id. 100; *Lawrence v. Ballou*, Id. 518; *Polack v. McGrath*, 38 Id. 666; *Yates v. Smith*, 40 Id. 662; *McKinlay v. Tuttle*, 42 Id. 571; *Poorman v. Mills & Co.*, 43 Id. 323; *Lick v. Diaz*, 44 Id. 479; *Russell v. Harris*, Id. 489; *Gates v. Salmon*, 46 Id. 362; *Brady v. Kelly*, 54 Id. 590; *Donner v. Palmer*, 51 Id. 629; *Washington B. Co. v. Stewart*, 3 How. (U. S.) 425; *Stacy v. R. R.*, 32 Vt. 552; *Rector v. Deanley*, 14 Ark. 307; *Dodge v. Gaylord*, 53 Ind. 365, and cases there cited. "A previous ruling by the appellate court upon a point distinctly made, may be only authority in other cases, to be followed, or affirmed, or to be modified, or overruled, according to its intrinsic merits; but in the case in which it is made, it is more than authority; it is a final adjudication, from the consequences of which the court can not depart, nor the parties relieve themselves." *Phelan v. San Francisco*, 20 Cal. 45. And this rule is equally true, although the prior decision be "in abrogation of one of the plainest principles of law." *Davidson v. Dallas*, 15 Id. 82. "It is very evident, that on the second appeal, we can not reverse our ruling on any question of law, which was decided on the first

appeal. The first decision, whether right or wrong, has become the law of the case:" *Polack v. McGrath*, 38 Id. 668. This rule only applies, however, where the facts remain the same upon a second trial, or upon a second appeal. If the facts change, the former decision is no longer the law of the case. "Nevertheless, if the facts change on a second trial of the whole cause, in the court below, after remanding, these may so change the nature of the case as to require a new decision as applicable thereto; and, if so, the former decision ceases, under the new development, to be the law of the case. For it is clear that a party on a re-trial *de novo* may introduce new evidence, and establish an entirely different state of facts, to conform to which is no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one as suited to the new phase of the controversy." Wells on Res Adjudicata and Stare Decisis, sec. 619; *Yates v. Smith*, 40 Cal. 671; *Russell v. Harris*, 44 Id. 489; *Jaffe v. Skae*, 48 Id. 542; *Meeks v. S. P. R. R. Co.*, 6 Pac. C. L. J. 1001; *Dodge v. Gaylord*, 53 Ind. 365, and cases there cited.

## COMMONS v. WALTERS.

[1 PORTER, 377.]

**IN SLANDER THE SUBSTANCE OF THE WORDS** only need be proved; but the proving of words that are tantamount to the words charged is not proving their substance.

**PROOF THAT DEFENDANT SAID TO PLAINTIFF**, "Are you not afraid, as you have perjured yourself," is sufficient to sustain an allegation that the former said of the latter, "You are perjured."

**WORDS IMPUTING TO A PERSON** the crime of perjury are in themselves actionable with or without a colloquium, and without proof that such person has taken an oath in a judicial proceeding and without production or proof of such proceedings.

**DECLARATION WHICH CHARGES THAT THE DEFENDANT SAID OF THE PLAINTIFF**, "He swore a lie," in reference to an affidavit made before a justice of the peace for the purpose of having the defendant bound to keep the peace, states a cause of action and may be proved by showing that such words were used with reference to such affidavit without further proof of the proceedings before the justice.

**ACTION OF SLANDER BROUGHT BY COMMONS AGAINST WALTERS.**  
The facts are stated in the opinion.

*Pickens*, for the plaintiff in error.

*Peck and Ellis*, contra.

By Court, SAFFOLD, C. J.. The present plaintiff brought an action of slander against the defendant, in the circuit court. The declaration contains seven counts, two of which only, are necessary to be particularly noticed. The first, charges a colloquium by the defendant, of and concerning a proceeding which had been instituted by the plaintiff against this defend-

ant, for the purpose of having the latter recognized to keep the peace; which complaint it is alleged had been made before, and the proceedings had by, and in virtue of the authority of Thomas Lowe, a justice of the peace. The substance of the allegation in this count is, that the defendant, speaking in reference to the proceedings aforesaid, and in reference to the affidavit made therein, and of, and to the plaintiff, said, "You have sworn a lie."

The fourth count, containing no colloquium, alleges that the defendant said of, and to the plaintiff, "You are perjured."

At the trial, the plaintiff took a bill of exceptions, which, with other matters remaining to be noticed, presents the question whether the absence of the written proceedings before the justice was sufficiently accounted for, to authorize the plaintiff to introduce evidence of their contents, so as to connect the charge of false swearing with those proceedings. Inasmuch, however, as we think this case can be properly determined on a different principle, I decline an examination of this feature of it.

The bill of exceptions shows that the plaintiff produced on the trial a witness who swore that he heard the defendant say to the plaintiff, "Are you not afraid, as you have perjured yourself?" That this was at Esquire Lowe's, on the day Walters was bound to the peace; that he heard no allusion made to the proceedings had before the justice. But the defendant introduced witnesses who deposed that they heard all that was said on that occasion, and all had allusion to the judicial proceedings had before the justice.

It also appears that in charging the jury, the judge instructed them to exclude everything uttered by the defendant against the plaintiff, if said in reference to the proceedings had before the justice; that to make such imputations evidence, the proceedings should have been introduced, or secondary evidence given of their contents, after a proper foundation laid for such, which had not been done.

This charge is one of the causes assigned for error.

It is considered unnecessary to examine the other counts in the declaration, or the question respecting the admissibility of the secondary evidence offered, as the principle of our decision on the first and fourth counts, and the charge to the jury, will dispose of the case for the present, and perhaps be a sufficient indication of our opinion for the future progress of the suit.

In reference to the fourth count, it may be remarked, that as

it charged the defendant with having imputed to the plaintiff the crime of "perjury" in its technical acceptation, it is clearly actionable in itself, with or without a colloquium—in other words, whether the reference to a judicial oath was expressed or implied; in neither event was any production or proof of the proceedings alluded to, necessary to sustain the action. On this point it is considered sufficient to refer alone to two cases heretofore decided by this court, with the references therein contained.

In *Lea and wife v. Robertson*, 1 Stew. 138, it was ruled, that "words making a general charge of perjury, are in themselves actionable, without proof that an oath had been taken by the plaintiff." Also, in *Harris v. Purdy*, 1 Stew. 231, the allegation was, "He has perjured himself on the trial," stating a colloquium concerning a particular trial: we said there could be no doubt that the words were actionable in themselves.

But it is contended that the words proved in the count, are variant from those alleged. The words charged are, "You are perjured:" those in proof, "Are you not afraid, as you have perjured yourself?" I think the latter fully embrace the former; and though it is not sufficient that they be tantamount, it is that they be in substance the same, and such is my construction of these: Stark. on Slander, 270–275.

In reference to the first count (as well as all others of the same import), and the evidence adduced in support of them, it may be sufficient to say—if under the averment, "You swore a lie," with a colloquium referring the imputation to an oath taken before Justice Lowe, in a proceeding instituted before him by the plaintiff, for the purpose of having the defendant bound to the peace, the words were proved substantially as charged, and also the reference to the judicial proceedings, this alone was sufficient to sustain the action. The law recognizes the authority of a justice of the peace, on complaint duly made, to bind the suspected person to keep the peace, and a charge of false swearing, in a case of this kind, implies perjury no less than in any other judicial investigation. If part of this proof was made by the defendant, the effect was the same as if all had been introduced by the plaintiff. This principle was recognized in *Harris v. Purdy*, so far as respects the subject of the colloquium. It was there held, that the words, "He swore a lie," colloquium of plaintiff's testimony on a trial before a justice, were actionable; and that it was not necessary to allege or prove that the justice had jurisdiction of the case, or that the plaintiff was duly sworn,

or that the false swearing was on a material point. In such case, all these are conceived to be sufficiently implied. If, however, the words are applied to a particular point, or matters sworn to, and from the nature of the subject the oath appear to be extrajudicial; or if the proof show it to be such; or if the contrary be not sufficiently implied from the subject, and manner of the imputation, then the action is not sustained, as was held in *Ward v. Clark*, 2 Johns. 10 [3 Am. Dec. 383].

In the first count in this case, and in some of the others, the words having been laid with reference "to the proceedings" already described, and in reference "to the affidavit made therein," they must allude to both or to either; and the law presumes perjury from false swearing in or concerning them. If the evidence of either party disclosed the contrary, the defendant was entitled to the benefit of such proof by way of instructions from the court to the jury. In this case such evidence does not appear to have been introduced; on the contrary, it was proved that the words were used in allusion to the proceedings had before the justice.

It may however be remarked, that so far as the plaintiff, in any count, has alleged the making by himself a particular affidavit, and the holding a particular court, or judicial investigation, and has made this a substantial part of the allegations of the count, this circumstance created the necessity of his proving the same by competent evidence, before he was entitled to recover for the words, which required a colloquium. But this principle, in its greatest latitude, can not apply to the fourth count, which charges words clearly actionable in themselves. Inasmuch then, as the instructions of the court below, required of the jury to exclude the evidence on this count also, we think there was error, for which, at least, the judgment must be reversed, and the cause remanded.

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**SLANDER.**—Substance of the words laid may be proved to sustain the declaration, but it will not do to prove words of equivalent import: *Hersh v. Ringwalt*, 2 Am. Dec. 392; *Wheeler v. Robb*, 12 Id. 245; *Estes v. Antrobus*, 13 Id. 496; *Slocumb v. Kuykendall*, *post*, and cases cited in note.

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## HARRISON v. HICKS.

[1 PORTER, 423.]

**ACCEPTANCE OF AN ORDER FOR MONEY**, in payment of a debt, discharges the debt, unless fraud intervenes or some failure happens.

**PAYMENT OF A DEBT BY ONE WHO IS NOT A PARTY** to the contract, although made without the assent of the debtor, extinguishes the debt.



AN EQUITY OF REDEMPTION is only available in chancery, yet in the case of a mortgaged chattel, where the debt has been paid, the legal title is perfect in the mortgagor, and may be asserted at law, notwithstanding the mortgagee may have in his possession a bill of sale of the property.

TROVER, brought by Nathan Hicks against J. J. Harrison and Absalom Harrison for the value of a slave named Harry. Plea, not guilty. Verdict for plaintiff for seven hundred dollars. The other facts are stated in the opinion.

*Stewart*, for the plaintiff in error. It requires two things to make a payment, namely, tender on the one part, and receiving on the other. Here the party attempts to establish a payment by proving that a power of attorney was given to the party who was to be paid, and authority conferred on him to receive money. But it does not appear that Paydon agreed to receive this authority as a payment. As to what constitutes a payment, see 17 Johns. 340; 7 Id. 311; 8 Id. 34, 389; 9 Id. 310; 3 Stark. Ev. 1084. Nathan Hicks was the only person authorized to pay the money and redeem the negro. A payment by Edward Hicks, without Nathan's consent, would not be a proper payment.

*Pickens, contra.*

By Court, THORNTON, J. This was an action of trover, brought by the defendant in error, to recover damages for the conversion of a negro man slave (the property of said defendant), by the plaintiffs in error. The errors assigned, are for the refusal of various charges requested by the said plaintiffs to be given by the court below, to the jury; as also, for charging as the bill of exceptions sets forth.

The evidence, to which reference is had in the instructions given, and refused, is substantially—that the slave sued for had been, some time prior to the institution of the present action, sold under an execution, upon a judgment obtained according to the laws and usages of the nation of Cherokee Indians, as to the validity of which, no question is raised on the record, against the defendant in error, and his brother, Edward Hicks: that one Wheeler became the purchaser of said slave; and by an agreement between him and the said defendant, the said defendant was entitled to redeem the said slave, upon the payment of the sum of money, viz., one hundred and five dollars, with interest thereon; which the said Wheeler had paid for him at the sale. Wheeler retained an absolute bill of sale for him; and the defendant retained the possession of the slave. Wheeler trans-

ferred the bill of sale to one Paydon, who, it would seem, took the assignment with the full knowledge of the contract between the defendant and Wheeler; and was only substituted to Wheeler's rights, under the said contract of redemption, between him and the defendant. There was evidence conducing to prove that, whilst Paydon held the bill of sale, Edward Hicks, the brother of the defendant, had, by a transfer of a demand which he held as an emigrating Indian, upon the agency of the government of the United States, for said emigrating tribe of Indians, paid off and discharged to Paydon, the said sum of money, upon payment of which, as aforesaid, the unincumbered title to the slave was to be reinvested in the defendant. After this, Paydon transferred his claim to the slave to the plaintiffs. The defendant in error continued in the possession of the slave until a short time before the commencement of this action, when he was forcibly taken from him—by whom it does not appear.

The several charges which were requested of the court, and refused to be given to the jury, involved three propositions: 1. That the debt due by the defendant, on the agreement with Wheeler, could only be discharged by the actual payment of money. 2. That a payment, or discharge of it, by Edward, the brother of defendant, without any contract between him and his brother, would not revert the legal title in the defendant. 3. That the facts, constituting the defendant's right to recover in this case, are cognizable only in a court of equity. All these propositions were repudiated by the court, and as I think, very properly.

As to the first, if the transfer of the claim upon the government agency, was in fact, by the contract between the parties, accepted in payment, and discharge of the debt, unless fraud intervened, or some failure happened, such as this record does not disclose, to vitiate the transaction, I know of no principle of law, which will avoid the contract.

The second proposition is equally untenable. It involves a palpable solecism; for the payment and discharge of a debt, no matter by whom effected, can be nothing more nor less than its extinguishment as a demand. As between the person who paid it, and him for whose benefit it was intended, a question might arise, whether it were purely voluntary or not, which would depend on the circumstance of previous request, or of subsequent assent, either express or implied.

As for the last of these propositions, the right of the defend-

ant, as it appears from the evidence, was clearly maintainable in a court of law. It is true, that an equity of redemption is only available in chancery. But in the case of a mortgaged chattel, where the debt has been paid, the legal title is perfect in the mortgagor. If this principle be correct, a resort to chancery would not be tolerated, even if the mortgagee were in possession of the property. But when the debt has been paid, and the chattel in possession, there can be no doubt of a perfect legal title, the bill of sale notwithstanding: 5 Com. Dig. 99; 4 Bibb, 452. The charge which was given, being in accordance with those principles, was, as we think, altogether unexceptionable.

Judgment affirmed.

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PAYMENT, presumption of, arising from taking a note: *Thacher v. Dinmore*, 4 Am. Dec. 63; *Varner v. Nobleborough*, 11 Id. 48; *Multon v. Whitlock*, 13 Id. 533; *Clopper v. Union Bank*, 16 Id. 294; *Hart v. Boller*, Id. 536; *Ainslie v. Wilson*, 17 Id. 532 and note; *Reed v. Van Ostrand*, 19 Id. 529 and note; *Glenn v. Smith*, 20 Id. 462 and note. Voluntarily made can not be recovered back: *Feemster v. Markham*, 19 Id. 135 and note.

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## HAWKINS v. STATE.

[1 PORTER, 475.]

ONE INDICTED FOR HORSE-STEALING can not plead as a defense to the charge, that the crime was committed, if at all, prior to a conviction against him for negro-stealing, for which he had received a pardon.

NEITHER A CONVICTION NOR PARDON, for a particular offense, can, in this state, operate as a bar, or discharge of any other distinct offense.

HAWKINS was convicted of horse-stealing. The facts are stated in the opinion.

*Martin*, for the state. The conviction and pardon of one felony does not merge all other felonies. The person pardoned is still liable to be tried, convicted, and punished for any felony which has not been pardoned. The old doctrine of the conviction and pardon of one felony merging all others previously committed, was founded on the ground of corruption of blood. The party having forfeited all his goods and chattels, by the first conviction, was liable to the same punishment but once. The doctrine of corruption of blood has no existence with us, and the reason having ceased, the law must cease with it: Bl. Com. 336, 337, 375; Aik. Dig. 201.

By Court, SAFFOLD, C. J. Hawkins, the prisoner, was, at a  
AM. DEC. VOL. XXVII—41

recent term of the circuit court of Limestone county, convicted of the crime of horse-stealing.

He pleaded in bar of this indictment, that at a previous term of the said court, he had been convicted of the crime of negro-stealing; that for this last-mentioned offense, he had been pardoned by the governor of the state; and that the offense for which he, the prisoner, then stood indicted, was committed, if at all, prior to the said former conviction. To this plea, the solicitor demurred—the court sustained the demurrer, after which, on an issue to the country, the prisoner was found guilty, and the judgment of the court was pronounced against him.

But the court reserved, as novel and difficult, the question, whether or not, there was error in sustaining the demurrer.

It is contended for the prisoner, that the offense for which he was last convicted, merged in the prior felony, and that the pardon for one operated as a discharge from both.

If there be anything in the common law, to countenance this defense, it must rest upon the principle of attainder and corruption of blood, and the consequent forfeitures, resulting from convictions under that law. These principles require no discussion on the present occasion, as they can have no application with us; the constitution having provided against any attainder of treason or felony; and declared that “no attainder shall work corruption of blood nor forfeiture of estate.”

A similar question occurred in South Carolina, as early as 1795: *The State v. McCarty*, Bay, 334. There the prisoner having been convicted of horse-stealing, a motion was made in arrest of judgment, on the ground that he had been convicted of a different offense subsequently committed, and had received a pardon for the same, which it was contended operated as a pardon for that also. After full argument on the question and deliberate consideration by that court, the judges were unanimous in the opinion, that the special pardon for the offense for which the previous conviction had taken place, did not operate as a bar to the prosecution, for the one then charged, or any other not particularly mentioned in the pardon.

On principle and authority, we feel quite clear, that neither a conviction nor pardon, for a particular offense, can in this state, operate as a bar or discharge of any other distinct offense.

Judgment affirmed.

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FELONY—CONVICTION, WHEN BARS OTHER PROSECUTIONS.—This question was considered at length in the note to *Crenshaw v. State*, 17 Am. Dec. 791; the principal case and others are cited and reviewed.

## McELDERY v. McKENZIE.

[2 PORTER, 33.]

AN EXECUTOR CAN NOT MAKE CONTRACTS, IN HIS REPRESENTATIVE CHARACTER, that will bind the estate.

EXECUTOR IS PERSONALLY LIABLE ON CONTRACTS made by him concerning the necessary matters, relating to the estate which he represents.

ASSUMPSIT. The facts appear from the opinion.

Parsons, for the plaintiff in error (defendant below).

Hopkins, *contra*.

By Court, HITCHCOCK, J. Murdock M. McKenzie brought an action of assumpsit, in the circuit court of Morgan county, against Thomas McEldery and Reuben Chapman, executors of William S. Goodhue, and declared against them for work and labor done by him for them as executors of said estate, at their instance and request, in and about the settlement of the estate of the said Goodhue. The declaration avers a liability and a *super se* assumpsit, in the common form. McEldery pleaded in short, "*non assumpsit*, and set-off," to which there was a replication and issue, in short. The cause was tried at March term, 1833, and a verdict was had in favor of the plaintiff against both defendants, for the sum of eighty-eight dollars and fifty-five cents, and a judgment *de bonis testatoris* was rendered thereon. No notice appears to have been taken of the failure of Chapman to plead.

At the trial, two bills of exceptions were taken to the opinion of the court. In the first, and only one which it will be necessary for the court to notice, it is stated, that "it was proved that the work and labor done, and which is sued for, was done at the request of the executors, as set forth in an account which is made part of the bill of exceptions, and which appears to be principally for posting up the books of the testator: upon which evidence the court charged the jury, that if they believed that the work done was such as was beneficial to the estate, that, in that case, it was chargeable to them in their representative capacity of executors, and not to them as individuals; and that such evidence did sustain the action against them in their representative capacity."

The case appears to have been treated by the plaintiffs, and the court below, as a suit against them as executors, and the charge of the court directly involves the question, whether an executor or administrator, by virtue of their general powers as

such, can make any contract in their representative character, which at law, will bind the estate, and authorize a judgment *de bonis testatoris*.

This court, in the case of *Greening v. Sheffield*,<sup>1</sup> Ala. 276, at December term, 1824, where defendant had given his note as executor, and was sued in his representative capacity, decided, "that in a court of law, the estate could not be charged in such a contract"—that Greening, the defendant, though liable in an action properly brought against him in his individual character, could not be made liable in the action against him as executor. This decision is decisive of this case: for if an executor can not give a note to bind the estate, he can not make any other contract in law to bind it. The limitation which the court, in this case, has placed upon the plaintiff's right, "that he should show that the work was beneficial to the estate," can not affect the case. It is a very proper inquiry as between the executor and the county court, when the executor presents his accounts for final settlement. But to say that the plaintiff's right to recover for work and labor faithfully performed, shall depend upon the benefit which the estate shall have derived from that labor, would be establishing a new principle in the law of contracts, not heretofore known.

If the executor is able to contract and bind the estate, the evidence of such contract and performance of the stipulations under it, by the plaintiff, would entitle him to recover. If he is not able to contract, except under the above restriction, then it would seem to follow, that he can not contract at all. That an executor or administrator can, at his discretion, employ workmen, make contracts, give notes and bonds, *ad libitum*, and bind the estate, and where there are more than one, bind all in that capacity, is a principle that seems only necessary to be stated, to be rejected. That an executor or administrator may contract for all necessary matters relating to an estate, can not be doubted, but he does so on his personal responsibility; and that the action to recover on such contract, at law, must be against him individually, is equally clear.

That there are cases in which a court of equity would charge the estate, there can be no doubt; but where the executor is living, liable to be sued, and for aught that appears, able to pay, the remedy is against him individually.

In this case, the action is against both executors: only one has pleaded. The evidence is, that the work was done at the

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1. *Minor*, 276.

instance of one, and which one does not appear; and the judgment is against both, and the estate is charged. So much error, in so short a case, does not commonly occur.

The judgment must be reversed; and as the action is misconceived, the case can not be remanded.

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CONTRACTS MADE WITH EXECUTOR OR ADMINISTRATOR are personal, and can not bind the estate: *Pearce v. Smith*, 4 Am. Dec. 588; but where from the situation of the estate it would be beneficial to it, that the services of a clerk or agent be obtained, there the expenses of such clerk or agent, if employed, will be allowed the representative by the court upon the settlement of his account: *Vanderheyden v. Vanderheyden*, 21 Id. 86.

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## McELYEA v. HAYTER.

[2 PORTER, 148.]

A PRE-EMPTION'S POWER OF ATTORNEY TO CONVEY LAND, held under the pre-emption law of May, 1830, as soon as patent has issued therefor, is void as an attempted evasion of the inhibition of the act against the transfer of pre-emption rights before patent issued; therefore conveyance under the power, though after patent issued, passes no title.

TRESPASS to try title. The facts appear in the opinion.

*McClung and Shortridge*, for the plaintiff in error.

*S. Parsons*, contra.

By Court, SAFFOLD, C. J. The action is trespass to try titles. The suit was instituted in the circuit court of Jackson, by Hayter, against the plaintiff in error, to recover possession of a half quarter section of land, in the district of land subject to sale at Huntsville; also, damages for the detention. A recovery was had in favor of the plaintiff below, according to the object of the suit. On the trial McElyea excepted to the evidence offered against him, but his objections were overruled, and the evidence was admitted.

This is the cause now assigned for error.

It appears that the land in question was entered by McElyea, under the act of congress, passed on the twenty-ninth of May, 1830, entitled "An act to grant pre-emption rights to settlers on the public lands;" that the patent issued to him on the first of June, 1831, in the usual form. It also appears in evidence that previous to the latter date, in September, 1830, McElyea had executed his power of attorney to one William H. Campbell, authorizing him in the name of the principal, to execute a deed of conveyance to Hayter for the land in question, as soon

as the patent should be obtained for the same. The evidence discloses the further fact, that subsequent to the date of the patent, in June, 1832, the deed of conveyance was executed pursuant to the power. It is also shown, that McElyea offered proof on the trial, that previous to the execution of the deed, he verbally revoked the power of attorney, forbidding Campbell to execute the conveyance; which proof the court rejected. All these documents appear to have been legally executed and recorded; except so far as relates to the capacity of the parties to contract concerning the subject-matter, at the time of contracting.

The act of congress referred to under which this entry was made, after granting the right, and prescribing the mode by which the settlers could avail themselves of its provisions, declares "that all assignments and transfers of the right of pre-emption, given by this act, prior to the issuance of the patents, shall be null and void." This inhibition is peremptory in its terms. The policy of the restriction, unquestionably was to protect the objects of the statute from the imposition or oppression of speculators or capitalists. The circumstances, which alone could confer this right of pre-emption on the settlers, their occupancy and cultivation of the public lands, presupposed them to have been indigent, and within the grasp of money holders. The right was about to be vested, without any previous negotiation on the part of those who were intended to be benefited by it, when it might well have been apprehended, as doubtless it was, that many in remote parts of the union, would for some time, remain ignorant of their rights, or of the requisites to establish them; and would not, therefore, duly appreciate them. The presumption also, was well warranted, that many might, previous to the passage of the act, have assigned or transferred the right, while it remained merely in expectancy; and that by these means, the actual settlers might be deprived of the intended bounty. Hence it was, that the government, while granting the right of pre-emption, absolutely interdicted the assignment and transfer of it prior to the issuance of the patent, by declaring all such assignments and transfers, "null and void."

Now, does not the power of attorney clearly imply a contract, assigning and transferring the right of pre-emption in this case, at the time of its execution, which was long prior to the issuance of the patent? It was also previous to an act of 1832, supplementary to the former act, which removed the



restraint, by providing that after that time, all persons who had availed themselves of the right of pre-emption under the former act, might assign and transfer their certificates of purchase or final receipts; and that the patents might issue for the lands in the name of such assignee. At the date of this latter act, congress appears to have acted on the presumption, that the danger of injustice or oppression, contemplated by the former, had ceased; that sufficient time had elapsed, for all persons entitled to pre-emptions to have become informed of their rights, and to have placed them beyond the reach of injurious speculation. It is perfectly clear, that one holding a certificate, or final receipt, for a pre-emption right of this description, under a transfer or assignment, executed prior to the date of the latter act of congress, could not have obtained the patent in his own name—that he would not, by law, have been entitled to it.

Had this been only a power constituting Campbell the general agent of McElyea, to transact his business in his absence; and among other things to convey and assign, or transfer his lands, such instrument would not have furnished internal evidence of a prior contract for the assignment or transfer of any particular article. But, in this case, the object is special and definite—that Campbell should, for McElyea, and in his name, alien and confirm by deed, to Hayter, individually, this particular tract of land; from which, the inference is irresistible, that a contract then existed for the “assignment and transfer” of the same, between these persons, such as the act of congress had declared should be null and void. The principle is not necessarily the same, as, if instead of this power, a bond for titles had been executed at the same time, and McElyea had afterwards, when in possession of the patent, executed the deed pursuant to the previous void agreement. In this latter case, the subsequent execution of the conveyance would have constituted a new contract when there was no restriction against it. But if suit were brought on such bond to recover the penalty, or damages, for the breach, it is clear that no such recovery could be had, because of the illegality of the contract, with reference to the subject-matter, at the time when made. Though it is true, McElyea could have legally revoked this power, or he could have adopted and sanctioned it, after being authorized to alien the land, it does not appear that he did either; and viewing it as a void or voidable instrument, he is not concluded by it, unless it can be inferred, that he afterwards adopted and ratified it; of which, however, there is no evidence; on the con-

trary, it appears he offered evidence of a verbal revocation, which the court rejected. I do not mean to say, that a parol revocation could avoid a valid power, executed by deed; but as this power was insufficient without a subsequent approval, adoption or ratification, we are fully authorized to assume the fact, from the rejection of this evidence, and the absence of any other, that there was none such.

The case of *Armstrong v. Toler*, 11 Wheat. 258, is an authority on the principle involved in this case. It was there held, that where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it; also that if a contract be, in part only, connected with the illegal consideration, and grows immediately out of it, though it be in fact a new contract, it is equally tainted by it.

Here it is fully evident, that the circuitous mode adopted to effect this assignment and transfer, was intended as an evasion of the prohibitory act of congress; therefore, the title thus acquired, must be pronounced null and void; and, the judgment below must be reversed, and the cause remanded, if desired by the plaintiff below.

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## HAUGHY v. STRANG.

[2 PORTER, 177.]

**A BILL IN EQUITY MAY BE DISMISSED** at any time during the pendency of the suit, for want of equity apparent upon its face.

**EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT**, for matter that might have been availed of as a defense, to the action in which the judgment was obtained.

**EQUITY WILL NOT GRANT RELIEF** as to matters of which there is concurrent jurisdiction at law, if these matters have been already submitted to and passed upon by the latter forum.

**BILL** in chancery, filed by Haughy, for relief against a judgment at law. The bill stated that Strang had recovered judgment against the complainant in an action of trover; that the property recovered was that of the complainants, and that on the trial (the court having convened earlier than usual, when he was unable to assemble his witnesses), unfair evidence, as he was informed, was introduced against him; that an application for a new trial was denied. The bill was dismissed for want of equity upon its face.

*Stewart*, for the plaintiff.

*Ellis*, contra.

By Court, THORNTON, J. This cause is brought up by writ of error, from a final decree of a chancellor, dismissing the bill of the plaintiff, on motion, for want of equity on the face of the bill, after answer filed, and after several continuances of the cause.

The first error assigned, questions the propriety of dismissing the bill, on motion. Independent of any general authority for this course, we have an express rule of practice, which allows it. The complainant can not justly complain of a result, which would have been inevitable at the final trial, no matter how long protracted, if the merits of his bill were disallowed. The time when a bill is dismissed for such a cause, being immaterial, the only question which can arise, is, whether the dismissal was proper, with reference to the matter which it contains. The bill in this case, reduced to its substance, is, to this effect: The complaint was sued in the circuit court of Tuskaloosa, in an action of trover, and a recovery had against him by the defendant. It alleges, that the property sued for, was, in truth and in fact, that of the complainant; that it had been pledged to the defendant only; and that the pledge was extorted by duress; that on the day when the judgment at law was recovered, the court met at an earlier hour than was usual at that season of the year; so, that neither he nor his witnesses were present; that, as he was informed, though he does not say he believes it, unfair evidence was introduced upon this trial, not relative to the matter in controversy; that he made an application to the presiding judge for a new trial, which was unkindly denied.

In deciding upon the propriety of dismissing this bill, two questions present themselves. The first is, whether the matters set forth were not all properly cognizable in the court of law, and might not have been fully availed, in defense of the action which he now seeks to overhaul: and, secondly, whether the facts alleged, by way of excuse, for not having done so, are sufficient to authorize an interference by a chancellor, especially as a new trial has been refused by the tribunal before whom the whole matter transpired. The doctrine is, that if the matter set up in the bill constitutes a good legal defense to the action, equity will not entertain a complaint; unless without any fault or negligence on the part of the complainant, by circumstances beyond his power to control, an opportunity of making that defense, was lost. As to the matter of this bill, whether of fraud, of duress, pledge of the property, or whatever else it discloses, I entertain no doubt, that there was ample means of

relief in the trial of common law, according to the principles which regulate that forum; and I am equally clear, that the failure to avail himself of them was not the consequence of such necessity as would authorize the interposition of chancery.

There is another principle applicable to this case, as now presented, which, in my opinion, is decisive against the plaintiff. It is this: if a matter of defense is optional with a defendant, the court of law and of equity, having concurrent jurisdiction, however he might defend at law or not, yet if he elect to do so, and fail, he can not afterwards apply to chancery, unless that failure has been occasioned by unavoidable accident. Now the application for a new trial is one of those means of legal relief, which will, in presumption of law, always be allowed to prevail, in a case where the matter has not been settled in such a way as ought to be conclusive on the rights of the applicant. The very question attempted to be agitated in this bill, we are bound to consider as having been determined adversely to the complainant when his motion for a new trial was heard and overruled by the common law judge.

In every view which we can take of this case, we arrive at the conclusion, that the decree below must be affirmed.

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EQUITY WILL NOT RELIEVE WHERE THERE IS AN ADEQUATE REMEDY at law: *Willet v. Overton*, 1 Am. Dec. 72; *Lining v. Geddes*, 16 Id. 606; *Armstrong v. Cheshire*, 24 Id. 273. In the note to *Oliver v. Pray*, 19 Id. 603, the power of a court of equity to relieve against a judgment at law is considered at length. See also, *McClure v. Miller*, 21 Id. 522.

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## MERRIWETHER v. GARVIN.

[2 PORTER, 199.]

THE RECORD OF THE JUDGMENT OF A COURT OF A SISTER STATE, is attested in sufficient compliance with the requirements of the act of congress regulating the authentication of records, where the certificate of the presiding judge is to the effect that the clerk attesting is the clerk of the court at the time of his, the judge's certificate, without further stating that he was clerk at the date of attestation.

ACTION of debt brought by Merriwether against Garvin. The facts are stated in the opinion.

*Stewart*, for the plaintiff.

*Crabb*, contra.

By Court, THORNTON, J. This was an action of debt in the circuit court of Tuskaloosa county, upon a record of a judgment

rendered in the state of Georgia, in favor of the plaintiff in error, who was the plaintiff also in the court below, against the defendant. The record shows, that issues were joined upon the pleas of *nul tiel record* and of payment; and that upon the trial of the first issue by the court, the record declared on was held to be insufficient, for a defect in its authentication; which defect was, that the certificate of the presiding judge, omitted to state, that the clerk who attested the record, was clerk, at the date of his attestation, and certified only, that he was so at the date of his, the judge's certificate, and that such attestation was in due form.

That there was error, in rejecting the record; for this cause has been decided in this court, in the case of *Brown v. Adair*, at July term, 1831,<sup>1</sup> which decision, we still think, contains the just exposition of the act of congress, regulating the authentication of judicial proceedings. For this, which is the only matter presented to the consideration of the court, by the assignment of errors, the judgment of the court below must be reversed, and the cause remanded for further proceedings to be had therein.

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RECORDS, WHEN PROPERLY CERTIFIED.—Where two records of a court of a sister state were produced, attached by being sewed together, and to the first in date there was a certificate of the clerk alone appended, to the second, certificates of both clerk and judge, the certificate of the latter officer referring to that of the former on the first record, both records were held properly certified: *West v. McConnell*, 25 Am. Dec. 191.

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## LOWREY v. MURRELL.

[3 PORTER, 280.]

ACCEPTANCE IN PAYMENT OF A DEBT OF THE NOTES OF AN INSOLVENT BANK, the fact of the insolvency being at the time unknown to either party, operates as a discharge of the debt.

**ERROR.** The facts appear from the opinion.

*Peck*, for the plaintiff.

By Court, SAFFOLD, C. J. Murrell brought his action before a justice, to recover forty dollars of Lowrey, and obtained judgment accordingly. Lowrey appealed to the circuit court, where a trial was had on the issues of *non assumpsit* and payment.

It appears by bill of exceptions, that Murrell had lent to Lowrey one hundred dollars, in payment of which sum, Lowrey, in part satisfaction, paid two bills on one of the banks in Georgia, of twenty dollars each; that several months after the institution of the suit before the magistrate, the bank appeared to have stopped payment; the particular time did not appear. There was no proof that the notes had been presented at the bank for payment, or of notice given to Lowrey, or of any offer to return them to him. The notes were admitted to be genuine, and it appeared in evidence they were worth about fifty cents in the dollar. There was no evidence of fraud or bad faith in the payment.

Lowrey requested the court to instruct the jury, that if they found the facts as above stated, the plaintiff was not entitled to recover; also, that unless the evidence showed, a failure of the bank before the issuance of the warrant, which was the commencement of the suit, the plaintiff could not recover. All which the court refused; but charged, that the only question in the case was, did the defendant owe plaintiff a debt, and did he pass the notes in question in payment of it; if so, were these notes of a bank which had stopped payment before they were thus passed; in the latter event, they must find for the plaintiff. The opinion of the court, in refusing the instructions as requested, and in giving the contrary charge, being excepted to, is here assigned as erroneous.

In the argument of counsel (which has been *ex parte* plaintiff) the transaction has been treated as one in which a promissory note, or bill of exchange, has been passed in the purchase of an article or in discharge of a pre-existing debt. In cases of the former description it has been ruled that, if a vendor of goods receive from the purchaser the note of a third person (such note not being forged, and there being no fraud or misrepresentation on the part of the purchaser as to the note, or the solvency of the maker), such note will be deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved: *Whitbeck v. Van Ness*, 11 Johns. 409 [6 Am. Dec. 383]; *Reed v. Cook and Cadwell*, 15 Id. 241; also, in a case of the latter description, *Wiseman et al. v. Lyman*, 7 Mass. 286, it was held, that where the defendant received in payment of a debt due him from the plaintiff, the promissory note of a third person, payable to said defendant, such note is at the risk of the

defendant, unless there be fraud, or some agreement to the contrary.

There has, however, been some contrariety of decision on these points, especially in reference to pre-existing debts; and in such cases a material inquiry is, whether the note of the third person was taken in absolute payment and discharge of the prior debt; or whether it was intended only as a guaranty of the debt, or conditional payment. If it be expressed or sufficiently implied, that such note was not passed in absolute payment, or if there be fraud or misrepresentation, resort may be had to the original consideration.

Payment of a debt in a description of money, which, if offered as a tender, and not objected to because of the kind, would be good, must, it would seem, be regarded as a valid payment. A tender must, in legal strictness, be of specie, and not of bank notes or bills: 3 Stark. 1390. But a tender in bank notes is now conceded to be legal and sufficient, unless it be specially objected to: *Wright v. Reed*, 3 T. R. 554; 2 Bos. & Pul. 526; 3 Stark. 1390, note Y, 1392; 2 Saund. Pl. & Ev. 368.

In *Whitbeck v. Van Ness*, 6 Am. Dec. 383, above referred to, the supreme court of New York distinguishes the effect of payments in genuine, from payments in spurious bank notes. They remark, that though the payee does not assume upon himself the risk of forgery, yet if the bill be genuine, and the bank fail, the parties being equally ignorant of the fact, the payment is available. In a late case, the same court remarks, in reference to payment in promissory notes, that the question is the same, whether the note be given for a precedent or contemporary debt, or whether it be the note of the party, or of a third person; that in each case it is, whether it was agreed to be received as payment: *Porter v. Talcott and Bowers*, 1 Cow. 359. Again, they say, the acceptance of the note of a third person, on the sale of a chattel for the consideration money, is payment: 3 Cow. 272; *Whitbeck v. Van Ness*, 11 Johns. 415, note [6 Am. Dec. 383.]

The case before us is conceived to involve a principle essentially different. Bank notes usually pass as current money, implying no warranty of solvency on the part of the payer. From the nature of the subject, and the usage of commerce, a payment so made, is a full indication of final settlement; much stronger than the passing a promissory note, bond, or bill of exchange, which custom has not sanctioned the use of, as money. Good faith is equally demanded in either case; so that for fraud or misrepresentation respecting the quality of

either kind of paper, as well as any other article, or for a false warranty respecting it, doubtless the person paying or passing it, would be legally responsible.

The idea may be plausible, that if a debtor has passed a currency in payment of his debt, which was believed at the time to have been equivalent to cash, but which in fact was worth nothing, or only half the nominal sum, the debt, in legal contemplation, should remain unextinguished. Such is admitted to be the law and justice of the case, if the paper be spurious, because of the implied warranty of genuineness or title; but according to legal analogy, and the nature of commerce, it is impracticable to carry the principle farther. If an article of property be sold in good faith, without warranty, apparently of great value, when in fact it was of little or none, the vendee is without remedy; if in the same contract, and in the same good faith, bank notes be taken in payment, and the result should afterwards be found so far different, that the property prove sound, but the notes unavailable from the failure of the bank, the loss must in like manner be borne by the vendor. The principle must be the same where the payment has been made of a pre-existing debt. Bank notes are usually in rapid circulation as cash, and are apt to pass through many innocent hands after the bank has stopped payment, and before notice thereof has reached the place; after which, nothing could be more embarrassing to commerce, than to upset all such transactions; nor would there be any justice in the principle. It would carry the responsibility back to the holder who first passed the note after the moment of failure, when several subsequent holders may have passed it in like manner, and without loss to themselves.

In the present case, the objection to the opinion of the circuit court, goes farther. The notes appear to have only depreciated about fifty per cent.; there appears to have been no offer to return them—no diligence attempted to collect or receive the money of the bank; yet the party thus making payment was held responsible for the full value of the notes, when at least they appear to have been available to the amount of about half their nominal value. But, independent of this latter objection, there is error in the record, for which, the judgment must be reversed, and the cause remanded.

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PAYMENT IN THE NOTES OF AN INSOLVENT BANK.—The effect of such payment is treated of in *Ontario Bank v. Lighbody*, ante. There a different result is reached from that announced in the principal case, but from the note in that case, it will be seen that the decisions do not all support its view.



# DYER v. TUSKALOOSA BRIDGE COMPANY.

[2 PORTER, 296.]

**THE LEGISLATIVE POWER EXTENDS** to providing for the laying off, regulating, and keeping in repair, roads, highways, bridges, and ferries, necessary for the public use and convenience.

**THE LEGISLATURE MAY AT ANY TIME RESUME POWERS** previously delegated by it to a public agent; therefore where a grant of a ferry franchise, by the county judge, was made, and the franchise was burdened by law with a power in the county judge to establish any other similar franchise demanded by public convenience, the granting of such second franchise, by the legislature, can not be complained of.

**A GRANT OF A FERRY FRANCHISE**, to meet public convenience, is not an exclusive grant, that will, on account of the prohibition against impairing the obligation of contracts, preclude the legislature from granting a bridge franchise, detracting from its value.

**WHERE A FRANCHISE HAS BEEN GRANTED SOLELY FOR PUBLIC CONVENIENCE**, there can be no demand for its depreciation in value, from the subsequent grant of a similar franchise.

**BILL** filed by Dyer, praying for an injunction against the erection of a toll-bridge. The facts appear from the opinion.

*Peck*, for the plaintiff.

*Crabb*, *contra*.

By Court, **HITCHCOCK, J.** The complainant in this case, charges, that he, for a long time has been, and now is, the proprietor of a ferry across the Black Warrior river, opposite the town of Tuskaloosa, under a license from the county court, Tuskaloosa county; that the defendants, under, and by virtue of an act of incorporation granted by the legislature of this state, are about to erect a toll-bridge across the said river within a few yards of his ferry, which, if completed, will very materially injure, if not entirely destroy, the value of his ferry. He further states, that he is the proprietor of a piece of land on the north side of the river, upon which the defendants intend to place one of the abutments of the bridge, and through which they intend to run a road leading from the bridge out to the main public road, leading from his ferry to the country. He contends that this act of the legislature is in violation of his private rights, and prays an injunction against the defendants, prohibiting the erection of the bridge.

The defendants have answered the bill, and have admitted the material facts as therein stated, but insist, by way of demurrer to the bill, that the complainant has not made out a case for the interposition of a court of chancery. The injunc-

tion, which was granted upon the filing of the bill, was, on hearing of the bill, answer, and demurrer, dissolved, and the bill dismissed; and the case has been brought to this court for revision.

The complainant insists, that the grant to him of this ferry, is a contract between him and the state, and that this act of incorporation is unconstitutional and void.

1. Because it operates to the destruction of his grant;
2. Because it impairs the obligation of his contract with the state; and
3. Because it deprives him of his property, without due process of law, and without just compensation.

An investigation into the constitutionality of an act of a co-ordinate department of the government, is always a delicate, if not a painful duty. But, when the rights of individuals are concerned, and the question is distinctly presented, courts have no alternative. Upon the faithful discharge of their duty, depends the "integrity and duration of the government;" and if the court, in the investigation of this case, had found the positions assumed by the complainant, sustained by the constitution and the laws, they would not hesitate to pronounce the act complained of, void.

The court has not, however, in the view which it takes of complainant's rights, in this case, found anything in the law complained of which authorizes its interference.

The laying off, regulating, and keeping in repair, roads, highways, bridges, and ferries, for the public use and convenience of the citizens, is an exercise of the supreme authority of the state, coeval with the institution of civil society, and indispensable to the free exercise of social and commercial intercourse; and as soon as men cease to roam abroad as savages, and lands become appropriated to private use, the reservation for public accommodation of a sufficiency for these purposes, is necessarily implied, and the mode of regulating its use, is necessarily vested in the state. It is a part of the eminent domain, and as such is treated by all writers on public law: Vatt., lib. 1, c. 20, sec. 249; Bynk., lib. 2, c. 15; Domat, b. 1, tit. 8, sec. 1. It is upon this principle that roads are laid out, and that the citizens are compelled to contribute either in money or labor to keep them in repair.

Our legislatures, in the exercise of this authority, have delegated to the judge of the county court and commissioners of roads in each county in this state, the power to lay out

public roads, to discontinue and alter the same, when found useless, so as to make them more useful: Aik. Dig. 358; to establish ferries, by granting licenses to individuals under certain regulations: Id. 363; and to erect free bridges, under the direction of the overseers, or to grant licenses for toll-bridges to individuals, under certain regulations. But in all cases where ferries and toll-bridges are authorized, the rights of the individuals, to whom the grants are made, are held subject to the superior and paramount rights of the community. The only right secured by law, to persons who have licenses to keep ferries, is that "no ferry shall be established within two miles of another already established," and in case of toll-bridges within three miles, and this right does not extend to ferries opposite to towns. In such cases, as many ferries may be established as the court may think proper; and in all cases, bridges may be established alongside of ferries, in the discretion of the court; so that in this case, the right of the complainant was and is subject to the establishment of ferries, and the erection of a bridge, even by the county court, in the immediate neighborhood of his ferry. If the county court could then, have authorized the erection of this bridge, under the general road laws, it is not perceived that the legislature, who have invested the county court with this discretion, are prohibited from making the grant directly.

It is true, that the grant of a ferry is a franchise. There is a great variety of franchises; some of them founded on valuable considerations, and necessarily exclusive in their nature, and which the government can not resume at its pleasure, or do any other act to impair the grant, without a breach of the contract. An estate in such a franchise necessarily implies that the government will not, either directly or indirectly, interfere with it, so as to destroy or materially impair its value, either by the creation of a rival franchise or otherwise: Kent Com. 458, 459. But a grant of a ferry over a public water-course, and for the convenience of the community, is not such an exclusive grant as is contemplated in such a case.

But it is contended, on the part of the complainant, that admitting the legislature have the power, upon the principles of public policy, to authorize the establishment of this bridge, and thereby destroy the value of this ferry, that this can only be done by making adequate compensation to him for this loss; on the principle that private property can not be taken for public uses, without just compensation. If this was a private and

exclusive grant, founded upon a valuable consideration paid therefor, this argument would undoubtedly be good. But, if we have successfully shown, that this is not such a grant, as we think we have, then this principle does not apply. What property has the complainant in this ferry, except in its use? and by what tenure does he claim the right to this use? It was originally granted to him for the benefit of the public; that public, it is now thought, require greater facilities—they have been granted; and if his profits are thereby lessened, has he any cause of complaint? He received his license subject to this contingency, and must abide by the consequences. Suppose the public convenience should require the road leading to a ferry to be changed, and the old road closed up. The county court has the power given to them to do this. Can the owner of a ferry at the old crossing, say, that this must be done only upon paying him what he may lose by the change? The fallacy of the proposition appears too plain to admit of elaborate illustration.

But it is contended, that the legislature have not only wrongfully destroyed the value of the ferry, but that they also wrongfully authorized the taking of plaintiff's land for the abutments and the road.

By the ninth section of the act incorporating this company, it is made the duty of the superintendents named in the act, to "select a site for the bridge, and also a site for a road leading to and from said bridge, and mark out the same, and apply to the court of roads and revenue for a jury to assess the damages, if any shall be claimed, for the lands the road may pass through, whose duty it shall be to appoint said jury, and as soon as the damages shall be paid by the company, to order the road to be opened, under the same rules and restrictions as other public highways, and which road shall be of the first grade, until it shall intersect other roads."

Admitting, that as well by the common law, as by the thirteenth article of our bill of rights, private property can not be taken for public uses, without just compensation, yet the court can see nothing in the section above recited which conflicts with this principle. Here, as much ground as is necessary for a road from the bridge to the main public road, is condemned, and placed upon the footing of other public highways; but before it can be taken, a jury is to assess damages, if demanded, which damages must be first paid before the ground can be used. This is the ordinary mode of condemning the use of

lands in such cases. A transfer of the fee of the land to the company was not necessary, and it is presumed, was not contemplated; and should the bridge be destroyed, and the company dissolved, the use of the ground would thereby revert to the original proprietor. It is decided in 2 Bay (S. C.) 38—that the legislature of the country is vested with the power to pass laws for laying off roads and highways in every part of the state, and to appoint commissioners to see them kept in repair, whenever they may think convenient and proper, without any compensation to the owners of the lands through which they run. This, it is said, is a part of the *lex terræ*—a condition attached to all freeholds and which existed before magna charta. However this may be, as to compensation; in this case the legislature have given the proprietor a mode of recovering damages, if he thinks proper to demand them, equal to the injury he may sustain.

We are, therefore, in every point of view, in which the case can be viewed, clearly of the opinion, that the decree below must be affirmed.

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LEGISLATURE MAY REGULATE THE USE of a railroad franchise and limit the amount of tolls thereon, if not deprived of that power by a legislative contract with the owners of the road: *Beckman v. Saratoga & Schenectady R. R. Co.*, 22 Am. Dec. 679.

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## RANDOLPH v. PERRY.

[2 PORTER, 376.]

**AN AGREEMENT WITHOUT CONSIDERATION TO PAY A DIFFERENT COMPENSATION**, and one of a character not more certain than that originally stipulated, in discharge of a liability upon a completed contract, is not binding, nor does it discharge the original contract.

**CHARGES FOR WITNESSES NOT EXAMINED ON THE TRIAL** may be included in the bill of costs, notwithstanding the statute providing that the charges of not more than two witnesses to any one fact, shall be allowed, if the necessity of examining the witnesses was obviated only by admissions of the opposite party or by decisions of the trial court; and the party wishing to revise such bill of costs must show, in his bill of exceptions, that these circumstances did not exist.

**ASSUMPSIT.** The facts appear in the opinion.

*Stewart*, for the plaintiff in error (defendant below).

*Erwin*, contra.

By Court, SAFFOLD, C. J. The action was assumpsit, brought

in Greene circuit court, by Perry, against the plaintiff in error, to recover an account for carpenter's work.

There were various counts in the declaration, and the general issue was pleaded. A bill of exceptions shows, that the plaintiff below gave in evidence a written agreement, dated Greensboro', July 31, 1828, specifying the items of work to be done, size of the house, etc.; and by which Perry was bound to complete the work on or before the first of January next thereafter; and Randolph to pay him at the same time the sum of nine hundred dollars. This agreement was signed by both the parties, and to it was appended the following: "Any alteration in this building, either in diminishing the amount of the work, or measuring the same, subject to reduction or addition, according to the usual charges of mechanics."

After which, the defendant gave in evidence the following written agreement: "Greensborough, August 23, 1828. Whereas, since the agreement between Rolls Perry and R. C. Randolph, for the wood-work of a brick building, dated July 31, 1828, said Randolph has signified his intention to alter the plan of the house; it is therefore agreed by said parties, that there shall be a reduction in the contract for any work not required in the actual plan of the building, or there shall be an addition for work over and above the contract of thirty-first of July, which said reduction or allowance to be governed by the rates exhibited in said first-mentioned contract." This was also signed by both the parties.

Randolph introduced, as further evidence on his part, Perry's receipt for six hundred and sixty-eight dollars and fifteen cents, expressed to be paid upon the "within account." On the opposite side of the same paper was an account stated in Randolph's handwriting, containing various items of work, with prices set opposite each, amounting to seven hundred and thirty-eight dollars and seventy-five cents.

The record further states, that then the counsel for Perry introduced evidence to prove that a portion of the work was done in a manner superior to what was required by the plan of the house, and also other verbal evidence from which the jury might draw the conclusion, that after the execution of the contract and the actual completion of the house, the plaintiff and defendant had agreed to abandon the contract in writing, and to be governed in their settlement by the "Tuskaloosa bill of prices," without proof of any new consideration arising between the parties, or any request on the part of the defendant that

the contract in writing should be abandoned. This evidence being objected to by the counsel for Randolph, was admitted by the court.

A second bill of exceptions shows, that after the rendition of judgment against the defendant below, he moved the court to instruct the clerk to exclude from the taxation of costs the attendance of a portion of the plaintiff's witnesses. The facts appearing, on which the motion was founded were, that about sixteen witnesses had, at different times, been subpoenaed for the plaintiff; that of this number seven were in actual attendance at the trial, but that four only were examined. The motion was refused, on the ground that the court would not interfere.

The assignments of error are:

1. That the court admitted the evidence objected to, as stated in the first bill of exceptions.
2. That instructions relative to the taxation of costs were refused, as stated in the second bill of exceptions.

On the first point, the inquiry arises, whether the promise was of such a nature, and founded on a sufficient consideration, to render it valid and binding? The rule of law in this respect, is said to be, that, "if there be not a strict and undoubted moral obligation, even an express promise to do that which the law did not render compulsory, will not afford a cause of action, in the absence of an adequate consideration." Chit. on Con. 12. It will here be observed, that the question is not whether the defendant below was bound to pay for the work, a fair and adequate price. To this extent, he was bound by the contract under which the work was done. The original agreement, which was in writing, particularly described the contemplated building, and fixed the price for the work to be done upon it at nine hundred dollars; also stipulated, that for any alteration in the plan, an addition or reduction of the price should be made, "according to the usual charges of mechanics." These must be assumed to have been reasonable and adequate charges, sanctioned by the custom and usage of that place—Greensborough, not Tuscaloosa.

The subsequent written agreement, contains little, if anything more than a mere repetition of the same, that for the intended change of the plan, the reduction, or additional allowance, for such work should be governed by the rates exhibited in said first-mentioned contract. Under this stipulation, the only doubt that can arise, if any, is, whether the parties intended

that the reduction, or addition of price for the alteration, should be in proportion to the nine hundred dollars for the original plan, computing the amount according to that standard, or whether the data for this computation should be the "usual charges of mechanics." But this question is not presented. The question is, whether the prior agreements were abandoned, and a subsequent valid contract entered into, that the entire work should be paid for according to "the Tuscaloosa bill of prices." By this we understand is meant, a general bill of rates, including the various items of mechanical work necessary in such building, and which has been adopted by the mechanics and used at Tuscaloosa.

That the parties were competent, before this work was done, to agree on the Tuscaloosa prices, or any other standard that was not so grossly unjust, as to furnish a presumption of fraud or unfairness, is not to be doubted. In that case, the work to be done would be a sufficient consideration, and the bargain would fix the price. In the case before us, the work had been completed under a valid contract for what we must assume to have been an adequate consideration; so it stood, binding on each party, at the time of the supposed subsequent agreement now insisted upon in lieu of the former. It is shown that the defendant below did not request the substitution of the Tuscaloosa prices, in lieu of those under which the work was done; also that no new consideration moved between the parties as the foundation of this promise. It is perfectly clear, that if the alleged subsequent agreement is void, the former remains in full force. Then what consideration is there to sustain the subsequent agreement which it was supposed the jury might infer from the evidence offered? The liability otherwise existing was adequate to the work; such, at least, is the legal presumption. If so, there was not even a moral obligation to pay more, or according to any different standard. It can not be viewed as a compromise of any doubtful right; for no settlement was consummated; there was no liquidation of the demand; but the claim was left no less subject to litigation than before. We can not infer, if that could avail anything, that an adoption of the different standard, would in any degree have facilitated the settlement. It therefore results, that the promise or contract, if such was expressed, was *nudum pactum* and void: Chit. on Con. 11, 12, 13. Consequently there was error in the admission of the evidence tending to prove it.

On the second assignment it may be remarked, that the statute



of 1807 provides, that, in no bill of costs shall there be allowed the charges of attendance of more than two witnesses to any one fact. The facts here contemplated, must be understood to include all that are material, and which may necessarily arise in the progress of the trial, as well incidentally or collaterally, as those directly in issue. It can not be presumed to have been the intention of the legislature to disallow the attendance of witnesses to the successful party where, in consequence of the course adopted by the adverse party, or the decision of the court, the course of the trial has been diverted from the ordinary channel, so as to exclude or supersede the necessity of evidence, which would otherwise be proper. The object seems to have been only to protect the party against an unnecessary and oppressive accumulation of costs from the attendance or introduction of more than two witnesses to each material fact necessary to be proven. From the difficult nature of the subject, much must depend on the discretion of the judge trying the cause. But admitting, as held by this court in *Smith v. Donaldson*, that the construction of this statute is a subject of revision in error: yet the particular facts and circumstances under which the decision was made, must be more definitely shown than has been done in this case, before we can pronounce error in the decision. The record does not ascertain the number of material facts involved in the trial; nor preclude the idea that some admission on the part of Randolph, some decision of the court, or other circumstance, may not have obviated the necessity of proof, which otherwise would have been indispensable on the part of the plaintiff below.

We must therefore say, that no error on the latter point has been sufficiently disclosed. But on the first, the judgment must be reversed, and the cause remanded.

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MODIFICATION OF AN EXISTING CONTRACT must be upon a consideration, otherwise such modification will be void, and will not act as a discharge of the original contract: *Smith v. Tunno*, 16 Ala. Dec. 617.

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## AVENT v. READ.

[2 PORTER, 480.]

OUTSTANDING TITLE IS NO DEFENSE IN EJECTMENT, to a *terre tenant* sued upon a sheriff's deed of his interest in the premises.

LANDLORD CAN NOT JOIN AS CO-DEFENDANT with his tenant sued upon such deed, for the reason that his interests can not be affected in the suit, as plaintiff recovering on such deed comes into the exact estate of de-

defendant, and will, therefore, if defendant be a tenant, be after his recovery also tenant with the same rights and disabilities.

**IN TRESPASS TO TRY TITLES, DAMAGES MAY BE RECOVERED for the retention of the premises.**

**ERROR.** The opinion states the case.

*Parsons*, for the plaintiff in error (defendant below).

*Hopkins, contra.*

By Court, HITCHCOCK, J. This was an action of trespass to try titles and to recover damages, brought under the statute, in lieu of the action of ejectment.

There are several assignments, only two of which were argued by the counsel for the plaintiff in error. The others, though not abandoned, were not particularly noticed, and as the court, on inspection of the record, does not discover any error in them, they will not be noticed in this opinion.

The errors that have been argued, arise upon the following state of facts.

Read purchased at sheriff's sale, a quarter section of land, under a judgment against Avent, and brought this action to recover possession. One Gaston applied to the court, to be permitted to defend the suit, as the landlord of Avent, alleging, that he had purchased the land of Avent, before the judgment was rendered, under which the land was sold. The court refused to permit him to defend, and also refused to permit Avent to set up an adverse title in Gaston. The court also instructed the jury, that in this action, the plaintiff might recover damages for the detention of the premises, down to the day of the trial of the cause.

1. Upon the first part of this case, it is to be remarked, that as a general rule, a defendant in ejectment may set up against the plaintiff, an outstanding title in another, and the landlord may be permitted to defend by being made a co-defendant. But this rule has exceptions, and this is one of them. It has been held, 3 Cai. 188; 10 Johns. 223, that in ejectment, by a purchaser under a sheriff's sale, against the debtor, who refuses to give up possession, the defendant can not show title in another; for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will be tenant also, and will be estopped in a suit by the landlord from disputing his right, in the same manner as the original tenant, who becomes quasi tenant at will to the purchaser. The same principle was recognized also in 1 Johns. Cas. 152; 1 Johns. 44; in 12 Id. 182,

and in the case of *Scott v. Hancock*,<sup>1</sup> in this court. There was no error therefore, in this part of the case.

As to the second point in relation to the damages. The act abolishing fictitious proceedings in this action, declares that the plaintiff shall indorse on his writ that the action is brought as well to try titles as to recover damages, and that if he recover, he shall be entitled to an execution for possession, as well as costs and damages. This act received a construction in the case of *White v. St. Guirons*, Ala. 331 [12 Am. Dec. 56], which sustains the decision of the court in this case. It was there decided, that the "recovery of damages, to the extent of the mesne profits, is an appropriate object of the action of trespass." The legislature, in giving this action, intended not only to abolish the legal fictions in the action of ejectment, but also to enable the plaintiff in the same suit to recover full satisfaction for the detention of the premises, and thereby accomplish in one action, what before could only be done by two; to do this, damages must be allowed from the commencement of the trespass, down to the time of trial.

The judgment must therefore be affirmed.

OUTSTANDING TITLE, to be a defense in ejectment, must be a present, subsisting, and operative title: *Jackson v. Hudson*, 3 Am. Dec. 500. Such title can not be set up where there has been adverse possession for twenty years: *Jackson v. Harder*, 4 Id. 500.

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## HAYNES v. SLEDGE AND MAXY.

[2 PORTER, 530.]

THAT THE ORIGINAL WRIT ISSUED ON SUNDAY is a good plea in abatement. A REPLICATION TO SUCH PLEA may show facts making of the case an exception to the general rule avoiding such process, and it seems that the circumstances which by statute excuse the service of process on Sunday, also authorize its issuance on that day.

TRESPASS on the case brought by Sledge and Maxy against Haynes. The opinion states the case.

*Goldthwaite*, for the plaintiff, cited 7 Com. 399; 2 Dyer, 168.

By Court, THORNTON, J. This was an action of trespass on the case, brought by the defendants in error, who were plaintiffs below, against the present plaintiff. The only error assigned is, that the court below sustained the demurrer of the defendants to the plea in abatement, filed by the plaintiff. The plea

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1. 3 Stew. & P. 44.

was, that the original writ issued on Sunday, as was apparent from its teste. The maxim of the common law, "*Dies Dominicus non est juridicus*," as we learn from all the authorities, which we consult for its principles, expressly embraced and avoided every original process obnoxious to this objection: 20 Vin. Abr. 62, 63, tit. Sunday; 7 Com. Dig. 399; 3 Burr. 1598; 2 Dyer, 168.

There is no provision in our constitution, or any enactment of our legislature, which, by implication, or expressly, in the letter or spirit of it, abrogates this rule. The declaration of rights contains several clauses on the subject of religion, all of which have for their object the preservation of the rights of conscience, and the security of the citizen from any violation of his civil rights, privileges, and capacities, by means of any religious testes, or ecclesiastical establishments. It is expressly said, no human authority ought in any case whatever, to control or interfere with the rights of conscience. Now, if by express legislation, every original writ were declared void, which issued on Sunday, I could not say that such an act was in violation of the letter or spirit of the constitution. I would rather incline to the opinion, that it would not be. For although a Jew, a Turk, or a religious sectarian of any conceivable faith, or persuasion, might fill the office of clerk, and the doing of the forbidden act, would be no hurt to his conscience, and a fruitful source of profit; yet, such a municipal regulation of the functions of the office would surely be no violation of the rights of conscience; nor unconstitutional preference, of one sect to another; nor establishment of religion by law. Then the common law rule doing the same thing, would be liable to no greater objection.

We do not hesitate to declare, that it is incompetent to the judiciary, to abolish this rule of the common law. To decide that a writ issued on Sunday, is valid, would be equivalent to saying that the performance of the official duties of a large class of public functionaries, is as obligatory upon them, on this day, as on any other; for if the officer may do so, it might well be argued that he must; and we would by judicial decision be imposing a duty upon him, contrary to the common law, which the legislature have never, in this instance, thought proper to abolish.

We have a statute, Aik. Dig. 400, making void, to all intents and purposes, the service of any process on Sunday, except in criminal cases, or for a breach of the peace, unless upon affidavit made as prescribed, "that under cover of the said first

day of the week, the person liable, intends to withdraw or escape from the state." It would seem to me, that in those instances, where from the urgent necessity of the case, service of process is authorized, its issuance is under the same circumstances, rendered a matter of duty; and being provided for the prevention of fraud and iniquity, could not shock the moral and religious sense of the community, as a general disregard of the sabbath, assuredly would. If the writ in this case had been issued under circumstances making it an exception from the general rule, or if other facts exist, which would avoid the plea, it would have been competent to the party to have shown it by his replication; and as by the decision of the court, it was held that no such showing was necessary, the opportunity will still be allowed for the plaintiff to do so.

Let the judgment be reversed, and the cause remanded.

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JUDICIAL ACTS DONE ON SUNDAY: See note to *Coleman v. Henderson*, 12 Am. Dec. 290; and also *Story v. Elliott*, 18 Id. 423 and note.

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## CHAMBERLAIN, ADM'R, v. BATES, ADM'R.

[2 PORTER, 550.]

THE REPRESENTATIVES OF A DECEASED ADMINISTRATOR ARE RESPONSIBLE for the assets of the first estate, converted by their decedent, during his administration, to those persons only to whom the deceased was during his life liable.

THE AUTHORITY OF AN ADMINISTRATOR DE BONIS NON extends only to such personalty of the first decedent as remains unaltered or unconverted by his predecessor; therefore an action will not lie by such administrator, against the representatives of his predecessor, to recover the amount of converted assets of the estate in their hands.

ERROR. The opinion states the case.

By Court, SAFFOLD, C. J. The action was assumpsit, brought by Chamberlain, as administrator *de bonis non* of the estate of Negus, to recover of the defendant, as administrator of James P. Bates, the former administrator of said Negus, a sum of money received by the latter in the course of his partial administration of said estate, and which he had failed to pay over, or otherwise to account for.

To the declaration to this effect, was filed a general demurrer, on which the court gave judgment for the defendant.

This judgment on demurrer is assigned as erroneous, and is the only question for revision.

This question is now for the first time presented for the consideration of this court: it is not unimportant in principle, nor entirely free from difficulty. Yet as the argument has been brief, and *ex parte*, I will but concisely investigate a few of the prominent points necessarily involved.

The principle is sufficiently clear, that an executor or administrator, during the progress of the administration, is directly responsible to creditors, to the extent of assets received; and ultimately to the legatees or distributees for any residuum of the personalty; and consequently, after the death of an executor or administrator, his executor or administrator is in like manner responsible if all the assets have been actually converted by the former, so as to leave no authority for the appointment of an administrator *de bonis non*. I do not understand these principles to be contested on this occasion; but it is insisted, that where the executor or administrator dies pending the administration, leaving goods, chattels, etc., unadministered, and an administrator *de bonis non* has been appointed, the representatives of the former are responsible, not to the creditors, or others interested in the estate, but to the successor in the same trust. An argument used to sustain this principle is, that in this state, unlike the law of England, all debts are of equal degree, except some unimportant privileged charges; and that in case of insolvency (as may be the situation of this estate), the executor or administrator must exhibit to the county court the amount of all claims and assets, and represent the estate insolvent to the end that ratable dividends may be ascertained and paid over, by order of the court; that where the first executor or administrator has died or resigned, it is impracticable to adjust the estate, according to our system, unless his representatives be held responsible to the administrator *de bonis non*.

To this argument, perhaps a sufficient answer would be, that a change of the law in one respect, which merely creates the necessity of a corresponding change in another, can not of itself produce the latter effect, though injury or inconvenience should result from the incongruity. But I do not perceive any increased difficulty from the adoption of our system, even in cases of insolvency, to which only the argument applies. It is the duty of the executor or administrator, in all cases, to ascertain the condition of the estate, within a reasonable time, and if there be a deficiency of assets to pay all the debts, to represent the facts to the county court, and have the estate declared

insolvent. If he use the necessary precaution to make no undue appropriation of the funds, he can generally do so under either system. Nor do I discover that the difficulty is greater under our equality of debts, than in England, where the different degrees are allowed. If an executor or administrator under laws recognizing priority of debts, pay one of inferior degree, leaving others of superior, unprovided for, he is considered as having made the payment in his own wrong, and is no less chargeable with the latter. In like manner, if one under our law of equality, where there is a deficiency of assets, pay all, or a larger proportion of any debt, than the ratable proportion, he must be considered as having paid so much in his own wrong, and on that account is not the less responsible to other claimants. But it does not follow, from any of these views of the subject, that it is not the duty of the first executor or administrator, or in case of failure of the administrator *de bonis non*, if the estate be insolvent, to cause it to be so declared as early as practicable, and then, with the aid of the court and commissioners, to cause it to be finally closed, pursuant to our statute regulations. Nor does it necessarily result from the nature of the procedure, that this settlement, though arising on the report of insolvency by an administrator *de bonis non*, might not equally embrace all the accounts of the first administrator or executor, so as to extend to his representatives the same exemption from suits, that in such case, is provided for the administrator causing the declaration of insolvency, except as to judgments previously obtained against him, which, like payments made, imply an admission of sufficient assets.

The plaintiff, in support of his right of action, relies, as authority, upon a decision of the supreme court of Massachusetts, where, as he suggests, the statute provides *pro rata* payments, in case of insolvency, in a manner similar to ours. It is the case of *Jewett v. Jewett, Adm'x*, 5 Mass. 275. It is true, that the remarks of Chief Justice Parsons, who delivered the opinion of the court, afford some countenance to the principles insisted on in support of this action, but that case was essentially different from this, and the question originated out of an act of the probate court, in removing an administratrix from the trust, pending an action against her by a creditor of the intestate, which removal was by authority of a statute of that state, the special provisions of which, or how far they may have influenced the decision, do not appear. The want of assets, and this removal, were pleaded as matter of defense, and

on demurrer, the plea was sustained. In giving the opinion, the chief justice remarked, that if the defendant had assets, she must account for them with, and pay them over to the succeeding administrator. But in support of this position he cited no authority. And in conclusion, he said, that considering the manner in which the assets of the deceased were appropriated by their law, the court were of opinion the plaintiff could no longer sustain his action. He had, however, previously admitted, that at common law, the defendant might retain sufficient assets for the payment of the debt against the subsequent administrator; but he proceeded on the principle, that the common law mode of marshaling the assets for the payment of debts, according to their degrees of priority, may have given a sanction to the retainer, which their statutes did not. Whatever may be the correct rule of decision respecting the right of a removed administrator to retain assets in such case, especially under the statute of that state, I think it may be safely assumed, that, according to the common law, remaining unimpaired in this state, the representatives of a deceased executor or administrator may here retain a sufficiency of the converted assets to satisfy all demands, which were chargeable against the latter, in the fiduciary capacity during the continuance of the trust. The law and the reason may be different in the case of removal, which implies dereliction of duty, and a consequent necessity for prompt settlement.

Such is the spirit of our statute on this subject, which has also been referred to in support of this action. It authorizes the orphans' court, where administration has been granted on insufficient security, to require other that is sufficient: also where any administrator has embezzled, wasted, or misapplied, all, or any of the decedent's estate, or shall refuse or neglect to give bond with security as aforesaid, to forthwith revoke or repeal the letters of administration, and grant others to such person entitled thereto, as will give the requisite bond. The subsequent administrator "may have actions of trover, detinue, account, and on the case, for such goods or chattels as came to the possession of the former administrator, and were withheld, wasted, embezzled, detained, or misapplied, by any of them, and no satisfaction made for the same." By this I would understand, that authority is given to the new administrator, immediately, to institute either, or all the actions mentioned, that may be most appropriate for any misconduct, or either of the wrongs therein specified. It is justly to be inferred, that the



legislature, by expressly prescribing these remedies, intended to confer on the subsequent administrator, more extensive powers than by the common law, are incident to administrators *de bonis non*; otherwise it would have been sufficient merely to have authorized the removal, and the subsequent appointment.

On the part of the defendant has been cited the case of *Coleman, adm'r, v. McMurdo et al.*, 5 Rand. 51. The action was by an administrator *de bonis non*, against the representatives of the former administrator, as is the case before us. The president of the court being absent, the other judges gave their opinions *seriatim*, at great length, and after full discussion. The decision denied the right of action, Judge Coalter alone dissenting. He also inclined to admit, that the common law was against the right of action, but contended for the right in Virginia, on the ground of long usage, and the operation of statutes in that state, which the majority of the court determined to have been repealed.

Judge Carr adopts the principle, that if an executor dies intestate, only the personal estate, the property whereof is not altered, shall go to the administrator *de bonis non*, and not to the next of kin of the executor; because, from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault that he did not, as he might, alter the property: 2 P. Wms. 210, 340. Again, "that everything is unadministered, which has not been reduced into actual possession, and converted by the administrator;" also, "that an administrator *de bonis non*, is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie, and were not administered by the first administrator; as also debts due the intestate." Such is found to be the doctrine of the common law: Bac. Abr., tit. Ex'rs and Adm'rs; *Tangrey v. Brown*, 1 Bos. & Pul. 310.

From these principles it results, that the authority of an administrator *de bonis non*, embraces only such of the personality of the first decedent as remains unadministered, i. e., in specie, unaltered or unconverted by his predecessor. Hence it is, that the letters or commission of an administrator *de bonis non* is held to extend, as his title imports, to the unadministered assets alone, and so far only is one in that capacity to be regarded a trustee for distributees, and representatives of the testator or intestate. In the Virginia case cited, Judge Greene remarks, that, "no case has ever occurred in England, in which an administrator *de bonis non* has ever asserted a claim against

the representatives of a deceased executor or administrator, at law or in equity, for an account of the assets wasted or converted to his own use, by the executor or administrator; and, consequently, no adjudged case is to be found expressly affirming or denying the propriety of such a claim. He also draws what appears to be the just and necessary distinction between an administrator *de bonis non*, and a temporary administrator commissioned to act during the minority, absence, etc., of the person entitled to the general trust; a distinction which the argument of the plaintiff's counsel in this case would have the effect to destroy. He says the commission of an administrator *de bonis non* gives him only the goods not administered; "whilst in cases of an infant, executor, or administrator, or where one entitled to administration, or as executor, is absent, or is obstructed by a pending suit, whenever the impediment is removed, a general probate or administration is granted to him for the whole estate, and the administration is granted in the mean while to the administrator *durante minori etate* or *durante absentia*, or *pendente lite*, for the use of the executor or administrator, to whom a general probate or administration may afterwards be committed. They are only the bailees of such general executor or administrator, and therefore responsible to them." So, if administration be granted to an improper person, or by an improper court, and afterwards revoked, the subsequent administrator properly appointed, has a general commission of the administration, and is thereby entitled to call the displaced administrator to account, as in case of an executor *de son tort*: 11 Vin. Abr. 117, pl. 4.

In the case of an executor or administrator, who has, for misconduct, been removed from the trust, I have already conceded that the reason, and at least our statute laws, are different; that in such case, to a greater extent, the unfaithful or incompetent trustee may be called to an immediate account by the administrator *de bonis non*, who has been deemed more worthy the trust; that though this transfer of the assets or interests effects nothing towards the final settlement of the estate, except to render it more secure, this object alone may be a sufficient inducement for the change. Where, however, the necessity for the new appointment originates in no complaint, or distrust of the former trustee, but as a consequence of his death, no such danger is to be presumed. This being the case before us, the statute referred to does not apply to it, nor am I convinced that all our statute regulations concerning the settlement of estates have

materially changed the policy in respect to the question presented; if they have, the authority of the legislature must be revoked to change the remedy: the judiciary is incompetent.

Another view of the subject presented by Judge Greene, in the case cited, is not inapplicable to our system, and tends further to reconcile even the policy of limiting the authority of administrators *de bonis non*, as above proposed. Under this rule of practice, he says, the creditors have an immediate remedy against the executor or administrator of the predecessor, in which it is only necessary to prove a waste, or conversion, to an amount sufficient to satisfy the demand, and not to settle accurately the accounts of the administration; and without the intervention of the administrator *de bonis non*, all creditors to the extent of the fund in question, would be secured by bonds given by the legatees to the executor or administrator of the executor or administrator, to indemnify him against debts of the first testator, which may appear and be recovered against him. He alone being responsible to the creditors for the fund for which his testator or intestate was responsible, he is the proper and only proper person to whom those bonds should be given; whereas, if the administrator *de bonis non* has a right to recover this fund, it will be burdened with two commissions instead of one, or even more than two, if there be several successive administrators *de bonis non*. The creditors would be delayed until after a tedious litigation; the accounts of the first executor or administrator were finally settled in the suit of the administrator *de bonis non*, and he had been enabled to coerce the payment of the money, and their rights would be varied as aforesaid. They might be further delayed by the necessity of a suit against the administrator *de bonis non*, and so the legatees and distributees would also be delayed, not only by the first suit by the administrator *de bonis non*, but by their suit against him for a settlement of his accounts; and the hazard of loss to creditors, legatees, and distributees, would be doubled, trebled, or quadrupled, according as there were one or more successive administrators *de bonis non* from the possible, and indeed common insolvency of executors and administrators, and their securities.

The opinions of the majority of the court in the case cited of *Coleman, adm'r, v. McMurdo*, resulted in the conclusion, that an administrator *de bonis non* can not sue the representative of a former executor or administrator, either at law or in equity, for as-

sets wasted or converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees, or distributees.

The opinion of this court sustains the same principle, in reference to the common law and statutes of this state.

The judgment of the circuit court must therefore be affirmed.

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The rule adopted in the principal case has been changed by statute in Alabama: Clay Dig. 194. sec. 9; Rev. Code, 9, tit. 4, pt. 2.

CASES  
IN THE  
SUPREME COURT OF ERRORS  
OF  
CONNECTICUT.

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PRINCE v. CASE.

[10 CONNECTICUT, 375.]

**LICENSE EXECUTED IS GENERALLY IRREVOCABLE**, but not where some other principle of law is to be violated by such a construction.

**LICENSE TO ERECT AND MAINTAIN A HOUSE** or other structure on one's land, though executed, is not irrevocable, because such a construction would be in effect a violation of the statute of frauds.

**PURCHASER OF LAND WITHOUT NOTICE OF A LICENSE** given to another to erect and use a house thereon, is not bound thereby, though the license has been executed.

**LICENSEE'S POSSESSION OF THE HOUSE IS NOT NOTICE** to the purchaser in such a case.

**LICENSE MERELY PERSONAL, WHEN.**—A license to another to erect a house for his use on the licensor's land is a mere personal privilege, and expires with the death of the licensee.

**RECOVERY IN EJECTMENT BY A PURCHASER IS NOTICE** to the heirs or assigns of the deceased licensee to remove the building.

**FAILURE TO REMOVE THE BUILDING FOR MORE THAN A YEAR** after such recovery entitles the purchaser of the land to remove it himself.

**BUILDING MAY BE TAKEN TO PIECES** by such purchaser, in order to remove it, without his being liable in damages, if no wanton or unnecessary injury is done, and if the owner of the building has provided no place for it.

**TRESPASS.** At the trial it appeared that the trespass, committed in the fall of 1832, consisted in tearing down a certain building claimed by the plaintiff. The building had been erected in the year 1817 by the plaintiff's father on the corner of a tract of land owned by one Dudley Case, the said Case having given the plaintiff's father permission to erect a small dwelling-house there for his use. The house was occupied by the plaintiff's father until his death; but in 1826, two years before his death, he conveyed it to the plaintiff by a deed, duly re-

corded. Dudley Case died in 1824, and the farm on which the house was erected was sold and conveyed under an order of the probate court in October, 1824, to Erastus Case, who conveyed to the defendant one moiety in September, 1825, and the other in November, 1828. No mention was made in any of the deeds of the permission given to erect the said house. In March, 1829, the defendant brought ejectment against Tabiatha Prince, the occupant, for the land occupied by said house and the house, recovered judgment, and obtained possession in July, 1831, and afterwards tore down the house. Verdict for one hundred and twenty dollars, if, in the opinion of the court, the plaintiff had a right to have the house remain on the land, otherwise for fifty dollars. The questions reserved for this court appear from the opinion.

*Hungerford*, for the plaintiff.

*W. W. Ellsworth*, for the defendant.

WILLIAMS, C. J. The questions reserved are, whether the plaintiff could recover anything; and, if so, whether damages should be assessed upon the principle that he had a right to have the house remain on the land, or only had a right to remove it.

The plaintiff claims, that by putting the house upon the land of Case, by his consent, Prince remained the owner of it, with a right to have it remain there. It has been decided in *Massachusetts* and *Maine*, that the house or other building remains the property of him who placed it there, and is personal property in him: *Wells v. Bannister*, 4 Mass. 514; *Marcy v. Darling*, 8 Pick. 283; *Ashmun v. Williams*, Id. 402, 404; *Curry v. Com. Ins. Co.*, 10 Id. 540 [20 Am. Dec. 547]; *Ricker v. Kelly*, 1 Greenl. 117 [10 Am. Dec. 38]. In these states, it will be remembered, that they have no court of chancery with ordinary chancery powers. This court, however, in *Benedict v. Benedict*, 5 Day, 464, 467, seem to have adopted the ancient common law doctrine, that a fixed and permanent building erected upon another's land, even by his license, became his property; but if, in its nature and structure, it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery. As the defendant in this case has not claimed the property in the building to be his, but has taken it down, and left the materials for the owner, it does not seem to be necessary for us to inquire

whether the doctrine held in Massachusetts, or that adopted by a majority of this court in the case above cited, is correct. We need only inquire whether, if the plaintiff had a right to this building, the defendant was justifiable, under the circumstances of the case, in taking it down; in other words, whether the license to build, by Dudley Case, gave a right to Prince, and his heirs and assigns, to keep this house in that place. Was it an interest assignable, transmissible to heirs, and liable to be sequestered for his debts?

The plaintiff takes the affirmative of this proposition. He says, it is a license executed, and therefore irrevocable. As a general rule, that proposition is correct. But it can not be true, when some other principle of law is to be violated by such a construction. Thus, if a man authorize another to take away a certain dam, by which his land was flooded, and it is done, no attempt to revoke or alter its effect can be available. But it does not follow from this, that if a license was given to erect the dam on the land of another, and continue it there forever, the license to continue it would be irrevocable. If it did, it would be in the face of the statute, which requires all conveyance of an interest in lands to be in writing. For a license by which this dam could be continued in this place forever, would be as effectual in that case as a deed for the same purpose; and no case has been cited that goes this length. In *Webb v. Paternoster*, Palm. 71, where license was given to put a stack of hay upon land, it was held that it could not be countermanded until after a reasonable time had elapsed. This was, however, before the statute of frauds.

In *Winter v. Brockwell*, 8 East, 308, where Lord Ellenborough recognized this principle, the plaintiff permitted the defendant to create a skylight over his own premises, through which the plaintiff claimed a right to air and light; and Lord Ellenborough held, that it was not countermandable, at least without placing the party in the situation in which he was before. In *Tyler v. Waters*, 7 Taunt. 374, it was held, that a ticket to the defendant and his assigns, for twenty-one years, to visit the theater, was not an interest in lands within the statute; and a case is there cited: *Wood v. Lake*, Say. 3; S. C., Burr. MS. 36. That a license to stack coals on land for seven years can not be revoked in three years. The case of *Liggins v. Inge*, 7 Bing. 682; 20 Serg. & Lowb., was also cited. The parties were both mill-owners on the same stream. The defendant cut down a bank on his own land and erected a weir by consent of

the plaintiff's father, by which the water was diverted from the plaintiff's mill. Finding an injury to result, notice was given to the defendant to raise the bank as before, and a suit was brought. The court held that as the plaintiff's father had in effect consented to this diversion of the water, he must be considered as having abandoned his right to have the water flow in that course, and could not complain. In these cases, it was held that no interest was conveyed in the land; and in the last case the court intimate a very decided opinion, that if that was attempted, the conveyance would be void. In one case, it is said, that Lord Mansfield ruled, that if a man stood by, and saw another build on his land, he could not sustain an action of ejectment: 5 T. R. 556. This, however, has been sanctioned, it is believed, by no other judge. In *Malls v. Hawkins*, 5 Taunt. 23, Gibbs, J., doubted it, and it was holden by the court of king's bench, that where a license was granted to erect a cottage on land of the lord, and [it] was actually erected, this was not a license, but a grant which might be recalled immediately, a mere permission to occupy: *The King v. Horndon-on-the-hill*, 4 Mau. & Sel. 562. And we know it is every day's practice, in such cases, to resort to a court of equity for redress, which would be entirely unnecessary, if Lord Mansfield's opinion was considered as law. And in the case of *Benedict v. Benedict*, 5 Day, 469, Judge Swift says, in such case the only remedy of the purchaser is in equity.

This subject is treated by Parker, C. J., in the case of *Cook v. Stearns*, 11 Mass. 533, 538, in a most satisfactory manner: "Licenses to do a particular act," says he, "do not, in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land, for a particular purpose, and to enter upon it, at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by the statute."

But whatever might have been the effect of this between the parties, here third persons are interested. The defendant has purchased this estate without any notice of the plaintiff's claim. Had the plaintiff taken a deed from Dudley Case, and not recorded it, he could not have claimed against this defendant, and can he be in a better situation by a parol license than he would have been by a deed? The policy of our law is, that



titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new mode of conveyance is to prevail, incumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated, by secret claims of this kind. The law can not prefer the claims of those who take no care of themselves, to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who neglected the means the law put into his power should suffer, rather than he who has used those means.

It is said, however, that notice is to be implied, because Prince's possession was notorious. But of what was this notice? That he was himself in possession, and of nothing more. It did not prove that he claimed title, or that he was other than the tenant of the owner of the farm. The purchaser finding the possession of the farm generally in the representatives of Dudley Case, and that the same was sold under an order of probate as the property of Case, was not bound to presume, that a corner of the lot occupied by Prince was claimed by him as his property. If he examined the records, they showed that the whole farm had been conveyed since such occupation by Case as his own. And such an occupation is surely very slight evidence of title.

The actual notorious possession of real estate, by a *bona fide* purchaser, may, with other circumstances, be evidence against a purchaser or creditor, that he had notice of the conveyance when he purchased, so that his purchase was a fraud upon such possessor. And here no other fact exists tending to show any fraud upon him. Upon this simple fact no such inference can be drawn.

Perhaps, however, it is not necessary to consider even these questions, because the license given in this case, is not of the character claimed. It was a mere personal privilege, given to Prince, the elder, and never extended to his heirs or assigns. Now, if Case had put this into a deed, and granted him a license to erect a house there, for his use, surely the most that could be claimed would be an estate there for his life. When then this license is given by parol, it imports just what men

unskilled would think it imported. A good understanding existing between these two men, and the owner of the land being willing to have the other for a neighbor, instead of giving him a deed of land, which would authorize him to introduce any one he might choose, says: "You may build a place for you to live in." It is a personal privilege, and without saying whether it is countermandable at the will of the owner or not, we have no hesitation in saying that it expires when he who is the object of it dies. The rule is, that "a license doth not extend but to him to whom it is given, and can not be granted over:" *The King v. Newton*, Bridg. 115; *Howes v. Ball*, 7 Barn. Cress. 481; 14 Serg. & Lowb. 90.

In the case of *Jackson d. Hull v. Babcock*, 4 Johns. 418, where one Goodrich gave a license in writing to one Hitchcock to build a house about the pool at New Lebanon, and occupying it during his necessity or pleasure, and Hitchcock built a small house and occupied it seventeen years, and then sold it to one Cragie, the court held that Hitchcock had only a personal license or privilege to inhabit, and had no title to the premises; and that his sale to Cragie put an end to this privilege.

Here Prince, the father, not only sold to the plaintiff, but both he and Dudley Case are dead; and unless this is an interest assignable, or transmissible to heirs, it is extinguished.

If the right was then extinguished, perhaps no notice to remove the building was necessary. But if it was, the ejectment which has been brought, the recovery under it, and the possession taken, are sufficient notice that the defendant intended to resume his rights. More than a year after possession was taken under the ejectment had elapsed, and the plaintiff did not remove the building. This surely was a reasonable time; and the defendant had as good a right to take away the building from his premises as in the case of *Web v. Paternoster*, before cited, he had a right to turn his cattle into a field where he had allowed the plaintiff to stack his hay, and a reasonable time had elapsed for him to take it away: Palm. 71.

The remaining question is, has he done this in a reasonable and proper manner? The house might have been worth more to the plaintiff had it been removed without taking it to pieces; but the plaintiff had provided no place for it; and surely the defendant was not bound to provide one, nor could he be bound to incur that expense.

It is not shown, that the defendant has been guilty of any wanton destruction of the property, or any unnecessary injury in taking it down. If not, and he had a right to remove it, it is

not easy to see upon what principle he can be liable for any damages. Had he interfered with an attempt of the plaintiff to remove the building, a different question would have arisen. But as the plaintiff neglected, for so long a period, to make this attempt, the defendant was justifiable in removing it himself.

The superior court are therefore advised to enter up judgment for the defendant.

The other judges were of the same opinion.

Judgment for defendant.

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**PAROL LICENSE, WHETHER REVOCABLE OR ASSIGNABLE.**—The law relating to the revocability and assignability of parol licenses is examined at length in the notes to *Ricker v. Kelly*, 10 Am. Dec. 40, and *Rerick v. Kern*, 16 Id. 501. The general rule is as stated in the principal case, that a parol license executed can not be revoked: *Putney v. Day*, 25 Id. 470. So, though without consideration: *Rerick v. Kern*, 16 Id. 497. Where the owner of land has given another a parol license, for a valuable consideration, to build a bridge thereon, he is liable in trespass for removing such bridge without the builder's consent: *Ricker v. Kelly*, 10 Id. 33. Where a parol license is revocable at pleasure, an action brought for its continuance is a revocation: *Joy v. Hull*, 24 Id. 625. A conveyance of the land upon which another has erected a house under a license from the owner, is a revocation of the license: *Harris v. Gillingham*, 23 Id. 701. A licensee is not entitled to notice to quit: *Doe v. Baker*, 25 Id. 706. A parol license to cut timber on the grantor's land is not assignable: *Emerson v. Fisk*, 19 Id. 206. A license not acted upon within fifteen years is inoperative: *Gilmore v. Wilbur*, 22 Id. 410.

The principal case is reported in connection with *Rerick v. Kern*, in 2 Am. Lead. Cas. (5th ed.) 540, as a leading authority on the law of licenses. It is cited in *Foot v. New Haven etc. Co.*, 23 Conn. 228, to the point that a purchaser of land without notice of a parol license given by the grantor to another person to build a culvert and divert water on the land, is not bound by such license. It is referred to also as an authority for the position, that a conveyance of land generally, revokes a license previously given by the grantor to a third party to enter upon and occupy the land, in *De Haro v. United States*, 5 Wall. 627. The case is recognized as an authority on the same subject in *Morrill v. Mackman*, 24 Mich. 282, and *Stevens v. Stevens*, 11 Meto. 257.

**BUILDING ERECTED ON ANOTHER'S LAND UNDER A LICENSE** from the owner, is the property of him who erects it: *Osgood v. Howard*, 20 Am. Dec. 322; *Harris v. Gillingham*, 23 Id. 701; *Russell v. Richards*, 25 Id. 254; S. C., 26 Id. 532. The principal case is cited as an authority, to the same effect, in *Parker v. Redfield*, 10 Conn. 497; *Baldwin v. Breed*, 16 Id. 68, and *Curtiss v. Hoyt*, 19 Id. 165. But where a wooden building is erected on a stone foundation, by the owner of the soil, it is a part of the realty, although erected under an agreement with another person, that the latter is to occupy it as tenant, at a stipulated rent, so long as the former owns the land, and that when he sells the land, the tenant shall have the building at a stipulated price, and remove it: *Landon v. Platt*, 34 Id. 517, 525, referring to *Prince v. Case* as impliedly sanctioning the general doctrine that wooden buildings, erected on stone or brick foundations, are part of the realty.

## MERRILLS v. TARIFF MANUFACTURING CO.

[10 CONNECTICUT, 384.]

**AGGRAVATION OF DAMAGES FOR INJURIES TO PERSONAL PROPERTY.**—In an action on the case for an injury to personal property, the fraudulent and malicious motives of the defendant, in perpetrating the injury, may be taken into consideration in estimating the damages.

**RULE OF DAMAGES IN TRESPASS AND CASE** is the same, in this respect.

**ACTION** on the case by the owner of one moiety, in common and undivided, of certain clothier's works, with the land and water privileges, dye-house, fulling-mill, finishing-shop, etc., against the owners of the other moiety of the said water privileges and fulling-mill, for removing and destroying the dye-house and fulling-mill, wrongfully and injuriously disturbing and interrupting the plaintiff's business and expelling him from the premises, and applying the whole of said water privileges, land, finishing-shop, etc., to the defendant's own use. The declaration alleged, among other things, that the defendants, being desirous of appropriating to their own use the said water privileges and excluding the plaintiff therefrom, and ruining his business, had wrongfully and injuriously purchased, for a small sum, the legal title of a certain mortgagee to whom the plaintiff had mortgaged the premises, and had induced him, in breach of trust, to convey to them, although the mortgage debt had, in fact, been paid. The plaintiff introduced evidence to support these allegations. The judge instructed the jury, among other things, that if the defendants purchased this outstanding mortgage title, though satisfied, as alleged, for the purpose of appropriating the water privileges to their own use, and getting rid of the plaintiff, and under color of that title and for such purposes committed the wrongful acts complained of, these facts might be taken into consideration in assessing the damages. Verdict for the plaintiff and motion for a new trial, on the ground of misdirection.

*Hungerford*, for the motion.

*Toucey*, contra.

By Court, HUNTINGTON, J. This case comes before us to correct a supposed error, in the instruction given to the jury at the trial, that, in estimating the damages, they were at liberty to take into consideration, the fraudulent and malicious motives and objects with which the defendants are charged to have committed the injury set forth in the declaration. It is insisted,

that in actions on the case, for injuries to personal property, the pecuniary loss sustained is the measure of legal compensation. It is admitted, that in actions of trespass for similar injuries, this rule of estimating the damages is not always applicable. We do not admit the correctness of this distinction. We have not been furnished with any precedent in support of it; nor have we been able to find one. We think that the rule which ought to govern juries in assessing damages for injuries to personal property, depends, not so much on the form of the action, as on the circumstances attending the case; and that whether redress is sought, by an action of trespass or on the case (and especially where the latter is the only remedy, as in the present case), if the injury is averred and proved to have been committed maliciously, wantonly, to gratify revenge, from a spirit of ill-will, and a desire to injure, or with the view of obtaining unlawfully and with a fraudulent intent, a benefit to the defendant, by means of the injury to the property of the plaintiff, these circumstances of aggravation, may, with great propriety, be considered in fixing the remuneration to which the plaintiff is entitled. We can not perceive any good reason why one measure of damages should be meted out to a plaintiff who sues in trespass, and a different one to a plaintiff who sues in case, for a similar injury, attended with similar circumstances. Such distinction would be as arbitrary and unjust, as it is technical. If the owner of a well should bring trespass against another, for an entry on his land and putting into the well any poisonous or offensive substance, the jury would not be restricted in awarding damages, to the actual pecuniary loss which the plaintiff may have sustained: *Sears v. Lyons*, 2 Stark. 817. And why should they be so restricted, should the plaintiff be a co-tenant with the defendant of the well, and should bring an action on the case for the like injury, committed under like circumstances?

In actions on the case, for injuries to incorporeal rights, where it is averred and proved that they were violated from malicious motives, with the sole design to injure, it seems to us to be consonant with the immutable principles of justice, that the same measure of redress should be awarded in such actions, as, it is admitted, would and ought to be given for similar injuries, committed in a similar manner, and where trespass would be the appropriate form of action. There is nothing in the legal nature of an action on the case, different from an action of trespass, which forbids the application of the same just and equita-

ble rule of damages to both. Whatever be the form of action, the injury is the same, and the legal compensation ought to be the same. No adjudicated case has been cited, nor have we found one, contravening these plain and obvious principles of justice and equity. We should have been surprised had any such case been found. It is familiar to us all, that in actions on the case tried at the circuit, the rule of damages stated to the jury in this case, has been one of constant application, and, as we believe, has been not only acquiesced in, but approved, by the profession. We are not aware, that until this case arose, it was ever questioned. If, therefore, there is no reported precedent for it, in our own courts, it is, probably, because it was never before doubted. The opinion now expressed is in accordance with the decision in *Gunter v. Astor et al.*, 4 Moo. J.B. 12. In that case, it is quite apparent, that the court considered the manner in which the defendants committed the injury, as having been properly considered by the jury, in estimating the damages. It was an action on the case for enticing away the plaintiff's workmen from his manufactory, to go into the service of the defendants. They were invited by the defendants to a dinner—who caused them to be intoxicated, and then induced them to sign an agreement to leave the plaintiff and come to them. It was proved that the plaintiff realized about eight hundred pounds per annum by the sale of his manufactured articles; and the jury gave him one thousand six hundred pounds. A motion for a new trial, on the ground of excessive damages, was made and argued; but was refused. Dallas, C. J., said: "I left it to the jury to give damages commensurate with the injury the plaintiff had sustained. The defendants clandestinely sent for his workmen, and having caused them to be intoxicated, induced them to sign an agreement to leave him and come to them; by which the plaintiff was nearly, if not absolutely, ruined. I am by no means dissatisfied with the verdict the jury have found; as the conduct of the defendants in point of fact, amounted to an absolute conspiracy." Park said: "The misconduct of the defendants, in this case, appears to have been most gross."

We think the instruction to the jury was correct, and consequently do not advise a new trial.

All the judges concurred in this opinion.

New trial not to be granted.

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AGGRAVATION OF DAMAGES TO PROPERTY.—Compensation is undoubtedly the central idea of the law of damages. Hence, under ordinary circumstances,

whatever the form of action in which damages are sought, the proper measure of the plaintiff's relief for the injury of which he complains is the pecuniary loss which he has suffered by reason of that injury. Indeed, some eminent writers have insisted, that compensation is the invariable rule of damages. This is the doctrine laid down in a valuable article from the pen of Judge Metcalf, in 3 Am. Jur. 287, entitled, "A reading on damages in actions *ex delicto*," and by Professor Greenleaf, in 2 Greenl. Ev., sec. 253, and in an article in 9 Law Rep. 529, which has been since appended as a note to the section of Greenleaf on Evidence above referred to. Mr. Sedgwick, however, maintains in his work on the Measure of Damages, as well as in an article in 10 Law Rep. 49, written in reply to Professor Greenleaf's article above mentioned, that whenever the elements of fraud, malice, gross negligence, or oppression, "mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." 1 Sedg. on Meas. of Dam. 38. The substantial difference between the positions respectively taken by Professor Greenleaf and Mr. Sedgwick seems, upon a closer view, not to be so radical as might at first be supposed. Professor Greenleaf, indeed, as already remarked, insists upon compensation as the uniform rule of damages, but he admits that this compensation is not to be limited to the mere pecuniary injury, but may extend to circumstances of aggravation arising from the malicious intent, wantonness, indignity, and insult accompanying the injury: See the note to 2 Greenl. Ev., sec. 253. He contends, however, that these aggravating circumstances are admitted to enhance the damages, not for the purpose of punishing the offender, but because the injury is in fact increased by the mental anguish, wounded feelings, sense of personal disgrace, etc., brought upon the sufferer by those circumstances. The principal point of disagreement between these two learned authors on this question, therefore, seems to be, not as to the circumstances which shall be held to enhance the damages, but as to why the damages are thereby enhanced. The amount of the recovery in any given case would probably be the same whichever view was adopted. It is undeniable, however, that the overwhelming weight of recent authority is in favor of the doctrine laid down by Mr. Sedgwick. We purpose in this note simply to discuss its application to cases of injuries to property.

EXEMPLARY DAMAGES, THEN, ARE ALLOWED WHENEVER FRAUD, MALICE, oppression, or other aggravating circumstances accompany an injury to property: *Day v. Woodworth*, 13 How. (U. S.) 363, 371; *Sherman v. Dutch*, 16 Ill. 283; *Cutler v. Smith*, 57 Id. 252; *Whitfield v. Whitfield*, 40 Miss. 352; *Storm v. Green*, 51 Id. 103. If a "trespass is committed with a high hand, and without color of right, wantonly, rudely, oppressively, evincing a heart moved by malice or revenge, the jury ought not to stop at the point of the mere value of the property and interest, but may also take into account the mortified sensibilities and reputation of the party, and the evil example of such conduct to the public at large." *Jamison v. Moon*, 43 Miss. 598, *per* Simrall, J. The damages in such cases are indeed compensatory, in that they go to the party injured; but they are also vindictive or punitive, in that the object of awarding them is to deter others from like offenses: *Cole v. Tucker*, 6 Tex. 266; *Cutler v. Smith*, 57 Ill. 252; *Craker v. Chicago etc. R. W. Co.*, 36 Wis. 657. "That corrective damages may be given for the sake of example," says Gibson, C. J., in *McBride v. McLaughlin*, 5 Watts, 376, "is as old as

the law itself;" and in another part of the same opinion he says: "Whatever may be the speculative notions of fanciful writers, the authorities teach that damages may be given in peculiar cases, not only to compensate, but to punish. There are offenses against morals, to which the law has affixed no penalty as public wrongs, and which would pass without reprehension, did not the providence of the courts permit the private remedy to become an instrument of public correction." There is manifest justice in the doctrine, that one who commits an injury willfully, and with an evil motive, should be dealt with more harshly than one who does a similar injury with no vicious feelings: *Schindel v. Schindel*, 12 Md. 108. It is easier and more satisfactory to graduate the damages by the wickedness of the wrong than by the degree of mental suffering occasioned by the evil intent, although, of course, the latter is proper to be considered. As Mr. Sedgwick very aptly says, in 10 *Law Rep.* 56, "If it is difficult to minister to a mind diseased, who is to compensate a mind exasperated?"

THE INTENT IS THE GUIDE in such cases. If the wrong was done innocently or without any evil motive, exemplary damages ought not to be awarded: *Sinclair v. Tarbox*, 2 N. H. 135; *McTavish v. Carroll*, 13 Md. 429; *Moor v. Crose*, 43 Ind. 30; *Becker v. Dupree*, 75 Ill. 167. If the injury was not malicious, that is to say, if it did not spring from an intent to vex, hurt, or annoy the injured party, exemplary damages should not be allowed, and the injury will not be presumed to have been malicious merely because it was unlawful: *Brown v. Allen*, 35 Iowa, 306. Nor will malice be presumed merely because the defendant suffered a default to be taken against him: *Chicago etc. R. R. Co. v. Baker*, 73 Ill. 316. Malice includes all the grounds upon which exemplary damages are allowed; but it is not necessary that there should be actual or express malice. It may be implied, as we shall presently see, from the nature of the injury or the circumstances accompanying it.

It follows from what has just been said, that an injury committed by mistake furnishes no ground for imposing damages beyond the actual pecuniary loss: *Walker v. Fuller*, 29 Ark. 448; *Jamison v. Moon*, 43 Miss. 598. So, where the injury arises from an unintentional omission of duty by an officer not acting willfully or oppressively: *Tripp v. Grouner*, 60 Ill. 474. So, where the defendant acted under a belief of right with due caution and circumspection: *Farwell v. Warren*, 70 Ill. 25; *Scott v. Bryson*, 74 Id. 420. But a belief of right will not protect one who perpetrates an injury wantonly, willfully, or oppressively: *Best v. Allen*, 30 Ill. 30; *Raynor v. Nims*, 37 Mich. 34; S. C., 26 Am. Rep. 493. Nor will the defendant's supposition that he had a legal right to carry away the plaintiff's grain, shield him from exemplary damages if he might have known that he had no such right: *Johnson v. Camp*, 51 Ill. 219. Evidence that the defendant acted under the advice of counsel is admissible to rebut the implication of malice and to defeat or mitigate a claim for exemplary damages: *Cochrane v. Tuttle*, 75 Ill. 361. But not where the trespass was wanton and willful: *Jasper v. Purnell*, 67 Id. 358; nor where, if the advice had been sound, it would not have authorized the proceedings taken: *Dyer v. Denham*, 54 Ga. 224; nor where the advice was not in fact followed: *Carpenter v. Barber*, 44 Vt. 441.

NATURE AND CIRCUMSTANCES OF INJURY AS SHOWING MALICE.—The nature of the injury complained of may be such as clearly to indicate malice, so as to warrant the imposition of exemplary damages, as where the defendant threw poisoned barley on the plaintiff's premises, to destroy his hens: *Sears v. Lyons*, 2 Stark. 317. So where the defendant killed the plaintiff's dog, under circumstances very aggravating to the owner: *Parker v. Mize*, 27 Ala.



480. So where the defendant beat the plaintiff's mare to death, with great cruelty and barbarity: *Wort v. Jenkins*, 14 Johns. 352, in which case a verdict imposing exemplary damages was sought to be set aside, but the court said that they would have been better satisfied if "the amount of damages had been greater, and more exemplary." And generally, circumstances, acts, and declarations attending and giving character to the wrong complained of, and showing it to be willful and malicious, or otherwise, are to be taken into the account, in estimating the damages: *Emblen v. Myers*, 6 Hurlst. & N., 54; S. C., 30 L. J. Exch. (N. S.) 71; *Bell v. Midland etc. R. W. Co.*, 4 L. T. N., sec. 293; *Newman v. St. Louis etc. R. R. Co.*, 2 Mo. App. 402; *Hefley v. Baker*, 19 Kan. 9; *Snively v. Fahnestock*, 18 Md. 391; *Young v. Mertens*, 27 Id. 114; *Raynor v. Nims*, 37 Mich. 34; S. C., 26 Am. Rep. 493; *Cook v. Garza*, 9 Tex. 358.

NEGLIGENCE alone will not warrant the imposition of exemplary damages: *Wallace v. Mayor etc.*, 2 Hilt. 440; *Moody v. McDonald*, 4 Cal. 297. But where the negligence is so gross and wanton as to be equivalent to malice, exemplary damages may be allowed: *Bannon v. Baltimore etc. R. R. Co.*, 24 Md. 108; *Pickett v. Cook*, 20 Wis. 358; *Peoria Bridge Association v. Loomis*, 20 Ill. 235; *Kountz v. Brown*, 16 B. Mon. 577; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156; *Kolb v. Bankhead*, 18 Tex. 228; *Byram v. McGuire*, Id. 530; *Emblen v. Myers*, 6 Hurlst. & N. 54; S. C., 30 L. J. Exch. (N. S.) 71. Thus, where the defendant pulled down his building in a manner so grossly careless, and with such contemptuous disregard of the plaintiff's rights, as to be tantamount to willful wrong, and some of the materials fell upon and injured a building and certain personal property upon the plaintiff's premises, exemplary damages were held proper: *Emblen v. Myers*, 6 Hurlst. & N. 54; S. C., 30 L. J. Exch. (N. S.) 71. So where, through gross negligence, the defendant ran against and sank the plaintiff's wharf-boat: *Kountz v. Brown*, 16 B. Mon. 577. So where, by the gross and willful negligence of the defendant and his servants, the plaintiff's jack was left chained to a tree all night in such a manner that the animal was choked and killed: *Byram v. McGuire*, 18 Tex. 530. So where the defendant negligently cut trees beyond the boundary line between himself and the plaintiff, when, with ordinary diligence, he might have ascertained where the boundary was: *Kolb v. Bankhead*, 18 Id. 228.

FACT THAT THE ACT OCCASIONING THE INJURY WAS CRIMINAL does not prevent the allowance of punitive damages in a private action therefor: *Cole v. Tucker*, 6 Tex. 266, as in a case of the malicious killing of the plaintiff's mare: *Garland v. Wholeham*, 26 Iowa, 185; or his slave: *Polk v. Fancher*, 1 Head, 336; or the malicious burning of his house: *Smalley v. Smalley*, 81 Ill. 70. But in one or two cases of criminal trespass it has been held that vindictive damages would not be allowed because it rested with the state to punish the wrong to the public by an appropriate criminal proceeding: *Butler v. Mercer*, 14 Ind. 479; *Humphries v. Johnson*, 20 Id. 190. It is true that one of the reasons sometimes given for the allowance of vindictive damages is that there are certain wrongs, not punishable criminally, which would entirely escape reprehension if such damages were not imposed: *Cutler v. Smith*, 57 Ill. 252. This might seem to limit this remedy to cases not punishable criminally. But the better doctrine is that there is no such limitation. See the note to 2 Sedg. on Meas. of Dam. (7th ed.) 332, collecting a large number of cases of criminal injuries to the person in which even a previous conviction and punishment for the crime have been held to be no bar or mitigation of exemplary damages. Exemplary damages are intended for punishment and example, but they are inflicted, not because the

act to be punished is a crime, if it be so, but because it is a tort of a highly reprehensible nature: *Brown v. Swineford*, 44 Wis. 282. They are not designed as a substitute for the ordinary penalty imposed by the criminal laws upon the wrong committed, nor are they intended solely to supply the want of such a penalty for acts not punishable criminally. There is nothing inconsistent in allowing both remedies where the act complained of is criminal. No reasonable objection can be urged against subjecting one who has committed a crime, which is also a private wrong, to the penalty of damages, graduated by the turpitude of the act, as compensation to the party injured, and as a warning to other evil-doers, notwithstanding the fact that the same act as a public offense is amenable to criminal punishment.

**FORM OF ACTION IMMATERIAL.**—The measure of relief for wrongs to the person and to personal property is the same, whether the action be case or trespass: 2 Sedg. on Meas. of Dam. (7 ed.) 484. The remedy for wrongs of the same nature ought to be the same in case as well as trespass, and exemplary damages are equally allowable in both: *Linsley v. Bushnell*, 15 Conn. 223, 236, and *Fleet v. Hollenkemp*, 13 B. Mon. 219, both approving the principal case; *McTavish v. Carroll*, 13 Md. 429; *Polk v. Fancher*, 1 Head. 336; *Windham v. Rhame*, 11 Rich. L. (S. C.) 283.

**WHERE A MALICIOUS OR WANTON INJURY IS COMMITTED BY AN AGENT**, the principal is not liable beyond the actual damages, unless he authorized or afterwards approved the wrongful act. Only he who is guilty of the malice or of the disregard of the plaintiff's rights, is to be punished with exemplary damages: *Becker v. Dupree*, 75 Ill. 167. But where the principal or master authorizes or subsequently approves a willful and malicious, or grossly negligent injury committed by his agent or servant, he is liable for punitive damages: *Byram v. McGuire*, 18 Tex. 513; *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156. It is decided indeed in *Grund v. Van Vleck*, 69 Ill. 478, that a subsequent approval by an innocent principal of a wrongful act committed by his agent, renders the former liable only for actual and not for exemplary damages. This position certainly can not be sustained. If the principal is liable for any damages, by reason of his subsequent approval of an act which he did not authorize, he is liable for all the damages. Any other rule would render it possible to defeat, in many instances, the wholesome doctrine of exemplary damages by throwing the liability upon irresponsible agents, who, to gratify the evil, though secret, desires of their principal, and in confidence of his approval, might perpetrate gross and wanton injuries upon others.

**CORPORATION MAY BE HELD LIABLE FOR VINDICTIVE DAMAGES** for wrongs committed by their agents, with their authority or subsequent approval: *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 156; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455; S. C., 29 Am. Rep. 43. Bad motives, malice, etc., may be proved against a corporation as well as against an individual: *Goodspeed v. East Haddam Bank*, 22 Conn. 543; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 54, both citing the principal case.

**EXAMPLES OF INJURIES TO PERSONAL PROPERTY FOR WHICH VINDICTIVE DAMAGES ALLOWED.**—Vindictive damages may be awarded for the malicious or wanton killing of a domestic animal or slave belonging to the plaintiff: *Parker v. Mise*, 27 Ala. 480; *Cole v. Tucker*, 6 Tex. 266; *Champion v. Vincent*, 20 Id. 811; *Polk v. Fancher*, 1 Head. 336. So for the taking, detention, or conversion of the plaintiff's goods, where there is fraud, malice, or oppression: *Holt v. Van Eps*, 1 Dakota, 206; *Dorsey v. Manlove*, 14 Cal. 553; *Johnson v. Camp*, 51 Ill. 219; *Whitfield v. Whitfield*, 40 Miss. 352. So

where the property is taken possession of in a "rude, angry, and forcible manner:" *Storm v. Green*, 51 Id. 103. So especially where the act is accomplished by an invasion of the plaintiff's home, to the terror and annoyance of his household: *Singer Mfg. Co. v. Holdford*, 86 Ill. 455; S. C., 29 Am. Rep. 43.

**RULE APPLIES ALSO TO TRESPASSES UPON REALTY.**—Injuries to realty, if coupled with malice, fraud, oppression, or circumstances of indignity and outrage, or gross disregard of the plaintiff's rights and feelings, may be punished by vindictive damages. Cases illustrating the application of the doctrine to injuries to realty under various circumstances are numerous: *Derragh v. Heath*, 37 Ala. 595; *Clark v. Bates*, 15 Ark. 452; *Curtiss v. Hoyt*, 19 Conn. 154, 170, citing the principal case; *Bull v. Grisnold*, 19 Ill. 631; *Culver v. Smith*, 57 Id. 252; *Stillwell v. Barnett*, 60 Id. 210; *Bauer v. Gottmanhauser*, 65 Id. 499; *Jasper v. Purnell*, 67 Id. 358; *Smalley v. Smalley*, 81 Id. 70; *Hefley v. Baker*, 19 Kan. 9; *Jennings v. Maddox*, 8 B. Mon. 430; *Schindel v. Schindel*, 12 Md. 108; *McTavish v. Carroll*, 13 Id. 429; *Franklin Coal Co. v. McMillan*, 49 Id. 549; S. C., 33 Am. Rep. 280; *Raynor v. Nims*, 37 Mich. 34; S. C., 26 Am. Rep. 493; *Theidenheit v. Edmundson*, 36 Mo. 226; *Newman v. St. Louis etc. R. R. Co.*, 2 Mo. App. 402; *Perkins v. Towle*, 43 N. H. 220, citing the principal case; *Winter v. Peterson*, 24 N. J. L. (4 Zab.) 524; *Martin v. Riddle*, 26 Pa. St. 415 in note; *Golding v. Williams*, Dudley (S. C.), 92; *Windham v. Rhame*, 11 Rich. L. (S. C.) 283; *Jefcoat v. Knotts*, Id. 649; *Greenville etc. R. R. Co. v. Partlow*, 14 Id. 237; *Cook v. Garza*, 9 Tex. 358; *Ellsworth v. Potter*, 41 Vt. 685; *Day v. Woodworth*, 13 How. (U. S.) 363; *McAfee v. Crofford*, Id. 447; *Merest v. Harvey*, 5 Taunt. 442; *Williams v. Currie*, 1 Man. G. & S. (1 Com. B.) 841; *Emblen v. Myers*, 6 Hurlst. & N. 54; S. C., 30 L. J. Exch. (N. S.) 71; *Bell v. Midland etc. R. W. Co.*, 4 L. T. N. S. 293.

**SUING OUT OR LEVYING AN ATTACHMENT, DISTRESS WARRANT, etc.**, maliciously or with a design to injure and annoy the plaintiff or to break up his business, or in a wanton, rude, or insolent manner, furnishes a case for exemplary damages: *Hazard v. Israel*, 2 Am. Dec. 438 and note; *McBride v. McLaughlin*, 5 Watts, 375; *Sherman v. Dutch*, 16 Ill. 283; *Lawrence v. Hagerman*, 56 Id. 68; *Clevenger v. Dunaway*, 8 Id. 367; *Huntley v. Bacon*, 15 Conn. 267; *Briscoe v. McElwoen*, 43 Miss. 556. But it is otherwise where there is no malice, fraud, or oppression, or abuse of process: *Dibble v. Morris*, 26 Conn. 416. So though the judgment on which the process issued was void: *Selden v. Cashman*, 20 Cal. 56.

**EXEMPLARY DAMAGES IN LIBEL:** See *Tillotson v. Cheetham*, 3 Am. Dec. 459.

**EXEMPLARY DAMAGES FOR BREACH OF PROMISE OF MARRIAGE:** See *Coryell v. Colbaugh*, 1 Am. Dec. 192.

## McLOUD v. SELBY.

[10 CONNECTICUT, 390.]

**SCHOOL DISTRICT IS LIABLE TO BE SUED** without any express statute giving the action.

**EXECUTION AGAINST A SCHOOL DISTRICT MAY BE LEVIED ON INDIVIDUAL PROPERTY** of an inhabitant thereof.

**INHABITANT WHOSE PROPERTY IS TAKEN UNDER SUCH EXECUTION** can not impeach the judgment upon which it issued.

**ASSUMPT**, before the county court, by Selby, an officer, against the defendants, upon a receipt signed by them, for certain property of the defendant McLoud, which the plaintiff had seized under an execution issued on a judgment recovered against a certain school district of which it appeared that the said McLoud was an inhabitant, and also the treasurer. The execution directed a levy upon the property "of the said debtor," to wit, the school district in question. The defendants objected to the admission of this execution in evidence because it did not authorize the defendant to seize the property of McLoud. The court held that as McLoud was an inhabitant of the district, the seizure was authorized, and admitted the evidence. Verdict for the plaintiff. The defendants brought a writ of error in the superior court, which was reserved for the advice of this court. The questions arising in the case are stated in the opinion.

*Toucey*, for the plaintiffs in error

*Hungerford*, for the defendant in error.

**BISSELL, J.** Upon this writ of error, which comes here for our advice, three questions are presented for decision.

1. Is a school district liable to be sued?
2. May the property of an individual corporator be taken to satisfy the judgment against the district?
3. Can the judgment be impeached by the individual whose property is so taken?

It has, indeed, been contended, that the declaration is insufficient, inasmuch as it is not alleged, that McLoud was a member of the district, at the time when the judgment was rendered.

With regard to this exception, it is only necessary to observe, that it was not taken in the court below. It was not there a point in judgment; nor has it been specially assigned as a ground of error. It is not, therefore, properly before us: *Picket v. Allen*, 10 Conn. 146; *Bissell v. Spencer*, 8 Id. 504; 6 Id. 327.

We are, therefore, brought to inquire:

1. Is a school district liable to be sued? Upon this point we entertain no doubt. That these corporations are capable of suing, and being sued, would seem to be strongly inferable, from the powers and privileges conferred upon them by the statute. They have power to erect school-houses, to purchase lands on which to erect them, to levy and collect taxes, to appoint treasurers and collectors, and to do all necessary acts, for the purpose of sustaining and regulating schools. They may,

therefore, possess property, and may make contracts; and may not these contracts be enforced?

It has, however, been said, that these *quasi* corporations are not liable to be sued, unless the action is, expressly, given by statute; and in support of this proposition, a number of cases have been cited. But none of the cases relied on, sustain the position, in the broad terms in which it has been asserted. The case of *Russell v. The Men of Devon*, 2 T. R. 667, merely decides, that no action will lie in favor of an individual, against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. The action was against the new dwelling in the county of Devon; and it was grounded on the neglect of a duty, imposed on them by law. It was admitted in the argument of the case, that if any individual, or a corporation, ought to have repaired this bridge, an action would have lain. And Lord Kenyon, in giving his opinion in the case, says: "But the question here is, whether this body of men, who are sued in the present action, are a corporation or *qua* a corporation against whom such an action can be maintained." The doctrine of this case is recognized in the case of *Riddle v. Proprietors of Locks and Canals on Merrimack River*, 7 Mass. 169 [5 Am. Dec. 35], although it was there decided, that an action on the case would lie against a corporation, for neglect of a corporate duty, by which the plaintiff suffers. And in the case of *Mower v. The Inhabitants of Leicester*, 7 Mass. 247,<sup>1</sup> it was decided, that no action lies at common law, against a town, for damages sustained through the defect of the highways in such town.

It may here be remarked, that the only principle involved in these cases is, that a *quasi* corporation is not liable, at common law, for the mere neglect of a corporate duty. But it does not, therefore, follow, that no action lies against them, unless it be given by statute. Let it once be admitted (as, indeed, it must be admitted) that these corporations have the power to make contracts, and there is an end of the question. For it, surely, would be a flagrant departure from all principle, to hold, that such contracts could not be enforced against them. A mechanic builds a school-house, in pursuance of a contract entered into with the school district. Could it be endured, that he might not sue on that contract, because an action was not given by statute?

It need only be added, that it has been the uniform practice in

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1. 9 Mass. 247; 5 C., 6 Am. Dec. 63.

this state, for individuals to enforce these contracts, by suits at common law, against these *quasi* corporations: *Whitney v. Brooklyn*, 5 Conn. 405.

2. May the property of an individual corporator be levied on and taken, to satisfy a judgment against the district?

It was not denied in the argument, that in England the property of the inhabitants of parishes, and of all *quasi* corporations, may thus be taken. The principle was undoubtedly familiar to our ancestors, when they emigrated to this country. And there is every reason to believe, that it was here early adopted, and incorporated into our system. So far as we have been able to ascertain, it has been the invariable practice, in Connecticut, and that from an early period, to levy executions against towns, upon the property of the inhabitants. This is recognized as a settled principle in the case of *Wholer v. Woodbridge*, 6 Conn. 223 [16 Am. Dec. 46]. And it is there strongly intimated, that the same principle is applicable to ecclesiastical societies. If, then, such be the principle with regard to these corporations, it seems to us that it would be breaking in upon the analogies of the law, to deny its application to school districts. "They are communities for different purposes, but essentially of the same character." We have seen what are their powers and privileges; that they make contracts, levy taxes, and possess property; that they are capable of suing and being sued. In all these particulars they are placed on the same footing as towns. And as in the one case the property of an individual may be taken to satisfy a judgment against the corporation, it is not easy to assign a reason why it should not so be taken, in the other case. It seems to us that the cases are strictly analogous, and that both must be governed by the same principle.

It has, however, been contended, that in the case before us, the execution issued against the corporate property only; and therefore, the property of an individual can not be taken. We do not think that this objection ought to prevail. In the case of towns, the action is, now, more usually brought directly against the corporation, and not against the inhabitants. Of course, judgment is rendered against the corporation, and execution goes against the corporate property only. And yet it is believed to be the uniform practice, to levy executions, so issued upon the property of the inhabitants.

It may, indeed, at first view, appear somewhat anomalous, that the property of an individual should be taken to satisfy an execution, issued against the property of a corporation. But

we do not feel at liberty to overturn a practice which is believed to be nearly coeval with our government, and which has become thoroughly incorporated into our system of jurisprudence. We are, therefore, of opinion, that the property of an individual corporator may be taken to satisfy a judgment against the district.

There is but one question remaining.

3. Can the judgment be impeached, by the individual whose property is to be taken?

It is, as was suggested at the bar, an elementary principle, that no one ought to be bound, as to a matter of private right, by a judgment to which he was not a party, against which he could make no defense, and from which he could not appeal. On the other hand, it is equally well settled, that no matter once litigated and determined, by proper authority, shall a second time be brought into controversy between the same parties. Are, then, the individual members of a school district, parties to a judgment, rendered against that district? This question, it may be remarked, is virtually involved in that which has already been considered. For it surely would be subversive of all settled principles, to hold, that the property of a man may be taken to satisfy a judgment, to which he was not a party. This can never be done. It may further be remarked, that with regard to *quasi* corporations in England, this question is well settled. All the inhabitants of a parish or hundred are parties to a judgment against such parish or hundred; and every individual is bound by the judgment. And in regard to towns, the principle is equally well settled in Connecticut. We have seen that the property of individuals may be taken to satisfy judgments against these corporations. But we shall look in vain for a case where such an individual has been permitted, collaterally, to impeach the judgment. That the corporation can not thus impeach it, admits of no doubt. Now, is it not highly inconsistent to say, that the corporation, as such, can not impeach the judgment, but that it may be impeached, by every individual member of the corporation? That it is conclusive upon the corporation, while not a single member of it, is concluded?

It has been already remarked, that this question is virtually involved in that which has been decided. The property of the plaintiff in error was rightfully taken to satisfy the judgment against the school district. The officer was not bound to receipt the property. He might have removed and sold it, at the

end of twenty days. Had he done so, the plaintiff in error would have been without remedy. Can it vary the principle, that the officer delivered over the property on a receipt, instead of retaining it as he might have done? It need only be added, that the doctrine now asserted was fully recognized in the cases which have been cited: See, also, *Fuller v. Hampton*, 5 Conn. 425; 2 Kent Com. 221; 3 Stark. Ev. 1062; *Brewer v. New Gloucester*, 14 Mass. 216; *Adams v. Wiscasset Bank*, 1 Greenl. 361 [10 Am. Dec. 88].

It has, indeed, been urged, that the members of the district might have been witnesses in the suit; and, therefore, they can not be parties. It may be admitted, that they might have been witnesses; but it does not necessarily follow, that they are not parties. The general rule is, undoubtedly, as has been claimed. But the rule is not without its exceptions; and we suppose it to be well settled, in this state, that the inhabitants of public corporations are competent witnesses, in cases where such corporations are parties. This point was directly decided, in the case of *Fuller v. Hampton*; and yet it was there distinctly admitted, that had the defendant below been acquitted, and recovered his costs, an execution therefor would have been issued against the property of the inhabitants of the town; and such, it was then said, is the invariable practice.

Again, it has been urged, that the plaintiff in error was not permitted to appear and defend in the suit against the district; and, therefore, he ought not to be concluded by the judgment.

It should here be remarked, that it does not appear from the record before us, that the plaintiff in error offered to appear; or that he was prevented from appearing and defending in that suit. What influence that fact, if presented by the record, might have had upon the case, it is not necessary to determine. It is sufficient to observe, that the fact does not appear.

The objection is grounded on the statute regarding communities: Stat. 131, and on (what is said to be) the uniform practice in this state.

The statute prescribes the manner in which towns, and lawful societies, communities, and corporations may sue and be sued, directs the manner in which process may be served, and then provides that they shall have power, in their lawful meetings, to appoint agents to appear in their behalf, and to employ attorneys, if necessary, to prosecute and defend in the suits, to which they are parties. We can perceive nothing in the provisions of this act, which should prevent an individual



corporator from appearing and being heard, if he thinks proper.

It is, however, said, that the uniform practice in this state has been otherwise; that individuals have not thus been permitted to appear and defend. We do not know how extensive may have been this practice in this state. Such, certainly, is not the rule in England. There the inhabitants of public corporations are considered as the real party, and are entitled to all the rights and privileges of a party: *The King v. The Inhabitants of Woburn*, 10 East, 395; *The King v. The Inhabitants of Hardwick*, 11 Id. 678.

In this state we have seen that they are so far considered as parties, that their property may be taken to satisfy the judgment. Can any good reason be assigned why they should not be treated as parties for all purposes? That they should not be permitted to defend against a judgment to which they are liable to respond? To deny them this right, would be to oppose all principle and all analogy.

That the individual members of a public corporation are concluded by a judgment against the corporation; and that their property may be levied on, to satisfy such judgment, we consider as too well settled, both on the principles of the common law, and by the uniform course of decisions, in this state, to be doubted. We do not feel at liberty to depart from it. And if a practice has obtained, which conflicts with this well-settled principle, we think it better that the practice should be corrected than that the principle should be abandoned.

Upon the whole we are of opinion, that there is nothing erroneous in the judgment complained of; and would so advise the superior court.

In this opinion the other judges concurred.

Judgment to be affirmed.

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QUASI CORPORATION MAY SUE without a statute expressly authorizing it, if the law of its creation imposes such duties and confers such privileges as require legal remedies for their enforcement and protection: *Ward v. County of Hartford*, 12 Conn. 407. But county can not be sued at law. As to what are quasi corporations, see the note to *Todd v. Birdsall*, 13 Am. Dec. 523. School districts are quasi corporations for certain purposes: *Andrews v. Estes*, 26 Id. 521.

THAT MEMBERS OF QUASI CORPORATIONS ARE PARTIES TO SUITS AGAINST THE CORPORATIONS, to a certain extent, and that their property is liable to be seized on execution against such corporations, see *Adams v. Wiscasset Bank*, 10 Am. Dec. 88, and note; *Atwater v. Woodbridge*, 16 Id. 49. See also, citing the principal case as authority on this point, *Fairfield etc. Co. v. Thorp*, 13 Conn. 181; *Wood v. Hartford Fire Ins. Co.*, Id. 211; *Beardsley v.*

*Smith*, 16 Id. 380; *Town of Union v. Crawford*, 19 Id. 333; *Second Ecc. Soc. v. First Ecc. Soc.*, 23 Id. 279. But this is true only to a certain extent. Members of such a corporation are competent witnesses in suits against the corporation: *Congregational Society v. Perry*, 25 Am. Dec. 455. The corporation can not, in such an action, set off debts due the members: *Kiane v. Town of New Haven*, 32 Conn. 215. Says Parks, J., in that case: "Every inhabitant has a right to appear and defend in a suit against the town, and this arises from the fact, that should judgment be recovered, his individual property would be liable to pay the judgment, in the first instance, and his just proportion thereof at all events: *Town of Union v. Crawford*, 19 Conn. 331. But in other respects they have never been regarded as defendants. They were considered as competent witnesses in actions brought by or against the town, when parties to suits could not testify. Their confessions and admissions were never received as evidence against the town: *Fuller v. Hampton*, 5 Conn. 417; *McLoud v. Selby*, 10 Id. 390; *Beardsley v. Smith*, 16 Id. 368. But in order that towns may be compelled to do their duty, and pay judgments when recovered against them, they are regarded as defendants. Towns generally have no corporate property, and unless they were so considered, many town liabilities could not be collected, for execution can only issue against the defendant in the suit."

## HALL v. HOWD.

[10 CONNECTICUT, 514.]

**CAPTAIN OF A MILITIA COMPANY MAY IMPOSE FINES** upon the members thereof for neglect to perform military duty when lawfully required, and, after due notice, may issue his warrant for the collection of such fines.

**WARRANT CAN BE ISSUED ONLY BY THE OFFICER IMPOSING** such a fine.

**VOID WARRANT IS NO PROTECTION** to the officer executing it.

**WARRANT ISSUED BY A MAGISTRATE OR OFFICER OF LIMITED JURISDICTION** must show on its face that he had jurisdiction of the subject-matter, the person, and the process.

**CAPTAIN'S WARRANT FATALY DEFECTIVE, WHEN.**—A warrant by the captain of a militia company, for the collection of a fine for neglect of military duty, stating that such fine was legally imposed, but not stating, or showing by reference to any other document, who imposed the fine, is void on its face, and the officer who executes it is liable in trespass.

**ACTION** for assault and battery and false imprisonment. The defendants justified under two warrants issued by one Howd, captain of a militia company, of which the plaintiff was a member, for a neglect of military duty, on May 7, 1832, and September 1, 1832, respectively. Both warrants were issued April 24, 1833, directed to either of the constables of the county, and commanding them "that of the goods or chattels of" the plaintiff they "levy, collect, and pay over, etc., a fine, legally imposed upon him," the said plaintiff, "for neglecting to perform military duty" on the days specified; "and for want of such goods or chattels, etc., to take the body" of the said plaintiff, etc. Both

warrants stated that the plaintiff was a private soldier, belonging to the said Howd's company, but did not show that he had been enrolled or notified. The plaintiff's counsel insisted that the warrants were void on their face, and were no justification of the plaintiff's arrest and imprisonment, and asked the court so to instruct the jury. The court, however, charged the jury that if they were satisfied from the evidence that the plaintiff had been duly enrolled and notified, and that the other facts set out in the defendant's notice of special matter were proved, the defendants were justified and entitled to a verdict. Verdict for the defendants, and the plaintiff moved for a new trial. Other facts are stated in the opinion.

*Sherman and Seeley*, for the motion.

*Kimberly and Mix*, *contra*.

WAITE, J. By the provisions of the statute of this state, "for forming and conducting the military force," the commanding officer of a militia company is empowered to impose a fine upon any non-commissioned officer, musician, or private, of his company, who neglects to perform military duty when lawfully required; and after having given him due notice, if the fine is not paid and no appeal taken, may issue his warrant, under his hand, for the collection of such fine. It is apparent, from the statute, that no person but the officer imposing the fine, has any authority to issue the warrant.

In this case, the defendant, Howd, as captain of a company, issued two warrants, directed to a constable, commanding him, of the goods and chattels of the plaintiff, to levy and collect two fines imposed upon the plaintiff, for not performing military duty in the company; and for want of such goods and chattels, to take the body of the plaintiff and commit him to jail. By virtue of these warrants, the defendant, Austin, as a constable, with the assistance of Bartholomew, the other defendant, arrested the plaintiff, and committed him to prison. For these acts of the defendants, the plaintiff brings his action; and the question now is, whether they can be justified in their proceedings: in other words, whether the warrants set forth in the motion are such as the defendant, Howd, had a right to issue, and the other defendants to execute. For if the warrants are void, Austin and Bartholomew, who acted under them, in committing the plaintiff to jail, and Howd, who commanded them to do the act, are unquestionably trespassers.

The first inquiry, therefore, is, whether Howd had authority

to issue such warrants. It is a well-established principle, that when a magistrate, or other officer, having a special and limited jurisdiction, issues a warrant to take the person or property of another, he must show, upon the face of his proceedings, that he has jurisdiction. Nothing will be intended in his favor. It must appear that he has jurisdiction over the subject-matter, the person, and the process: *Grumon v. Raymond*, 1 Conn. 40 [6 Am. Dec. 200]; *Tracy v. Williams*, 4 Conn. 107 [10 Am. Dec. 102].

In the case of *Wickes v. Clutterbuck*, 2 Bing. 483; 9 Serg. & Lowb. 49, it was holden, that if the warrant of commitment did not show an offense, over which the magistrates who issued it, had jurisdiction, an action of trespass lay against him for the commitment, although there might have been a previous regular conviction. Best, C. J., remarked that it was not perhaps necessary that the offense should be stated with the same precision in the warrant of commitment, as in the conviction; but enough should be stated to show an authority to imprison, and without such a statement, the officer could not arrest.

In the case of *The King v. The Inhabitants of Chilverscoton*, 8 T. R. 178, where two justices made an order for the removal of a pauper and his family, and having mentioned, in their order, two counties, Warwick and Coventry, afterwards described themselves as justices of the peace for the county aforesaid, without designating which of the counties, although it was admitted, that if they had been justices of the county of Warwick, and had so described themselves, their order would have been good; yet as it did not appear, upon the face of the order, that the justices who made it had jurisdiction, it was holden void. A similar decision was afterwards made in the case of *The King v. The Inhabitants of Moor Crutchell*, 2 East, 66.

An action was brought to recover a fine imposed by a court-martial, in Massachusetts. The judge, in giving the opinion of the court, remarked, that a court-martial was a court of limited and special jurisdiction. The law would intend nothing in its favor. He who sought to enforce its sentences, or justify its judgments, must set forth affirmatively and clearly, all facts necessary to show that it was legally constituted, and had jurisdiction: *Brooks v. Adams*, 12 Pick. 441.

So in *Starr v. Scott*, 8 Conn. 480, this court held, that a certificate of the commissioners upon an insolvent debtor's estate, which did not contain an averment that they had given the notice, which by statute, they were required to give, was void,

and afforded no protection to the debtor, or the sheriff, who in that case, had suffered the debtor to depart from prison.

In the warrant under consideration, it is not stated, that the fines, which the constable was commanded to collect, had been imposed by the officer, who issued the warrants. It is, indeed, stated, that the fines had been legally imposed, but by whom, does not appear, either from the warrants themselves, or by reference to any record or proceedings whatever. It is true they are signed by Howd, as captain of the company. But the neglect charged upon the plaintiff took place, in one instance, more than seven, and in the other more than eleven months, prior to the date of the warrants. Although Howd might have been captain at the time of issuing the warrants, it does not necessarily follow, that he was the commanding officer six months or a year previous. But whether he was or was not, the law, in a case like this, will not intend that the fines were imposed by him, in the absence of any averment of that kind. The form of a writ of execution, prescribed by statute, states before what court the judgment was obtained; and also refers to the records. In practice, it is believed, the form, in these particulars, is invariably adopted. So in the form prescribed of a warrant for the collection of a rate, it is stated by whom the tax was imposed.

The omission in these warrants of an averment that the fines were imposed by Howd, who issued them, is an omission to show his jurisdiction; and can neither be justified upon principle, nor by usage. The warrants, therefore, are void, and afford no justification to the defendants.

This view of the subject renders it unnecessary to consider the other objections that have been urged against their validity.

The charge of the court to the jury was erroneous; and a new trial must be granted.

The other judges concurred in this opinion.

New trial to be granted.

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JUSTIFICATION OF OFFICER BY PROCESS.—As to when the process under which an officer acts will protect him, and when not, see the note to *Savacool v. Boughton*, 21 Am. Dec. 109. See also *Chapman v. Dyett*, 25 Id. 598; and other cases in this series, cited in the note thereto. It is settled that a warrant issued by a court or officer of special jurisdiction, without having jurisdiction of the person, subject-matter, or process, is void, and that the officer who executes it is a trespasser: *Prince v. Thomas*, 11 Conn. 477, citing the principal case.

In *Hutchins v. Johnson*, 12 Conn. 383, *Hall v. Howd* is referred to as an authority for the doctrine that where a court to whom an authority is dele-

gated upon certain terms and conditions, has proceeded to act under that authority, without having seen that those conditions were complied with, its proceedings are void. The case is cited and distinguished on the same point in *West School District v. Merrill*, Id. 440. It is referred to also in *Fox v. Hoyt*, Id. 497, with respect to the distinction between courts whose proceedings and judgments import verity and protect all who obey them, and other special tribunals, and it is held that courts of justices of the peace belong to the former class.

## DERBY TURNPIKE CO. v. PARKS.

[10 CONNECTICUT, 523.]

**NOTICE OF AN APPLICATION TO THE LEGISLATURE FOR AN INCREASE OF TOLLS** on a turnpike road under the control of the applicants, is not absolutely necessary to be given to a party engaged in carrying the mails over said road under a contract with the United States, but who is not bound by his contract to carry the mails on said road, and the want of such notice will not avoid the grant passed in pursuance of such application.

**ALLEGATION IN THE APPLICATION, OF A MISTAKE IN THE CHARTER**, authorizing the construction of such road, with respect to the rate of tolls, but referring to the inequality of the tolls as evidently proving that fact, is a matter of inference, and, though erroneous, is not necessarily fraudulent.

**OMISSION TO STATE IN SUCH APPLICATION THAT THE MAILS** are carried over the road under a contract with the United States, by a third party, is not such a suppression of the truth as to amount to a fraudulent concealment.

**FRAUD IN OBTAINING AN ACT OF THE LEGISLATURE WILL NOT BE PRESUMED**, but must be clearly proved before the court will pronounce the act void.

**LEGISLATIVE GRANT IS A CONTRACT.**—A legislative grant to an existing turnpike corporation, of the right to increase its tolls, is a contract.

**REPEAL OF SUCH A GRANT IMPAIRS THE OBLIGATION** of the contract, and is unconstitutional, unless the right of appeal is reserved or the corporation consents.

**CONSIDERATION IS UNNECESSARY** to render binding an executed legislative grant of such a right.

**ASSUMPSIT**, to recover tolls of the defendant, for passing with his mail stage over the plaintiffs' turnpike road between July 1, 1829, and August 2, 1833. The plaintiffs were incorporated in 1798, and the rate of tolls which they were authorized to collect was fixed by their charter. The defendant, in 1828, entered into a contract with the postmaster-general, to carry the mails from New Haven to Norfolk, through Derby, and from that time until this action was commenced, had carried the mails in his stage to and fro over the plaintiff's road. In 1829, the plaintiffs petitioned the legislature for power to collect the same tolls on mail stages as on other vehicles. The opinion states the substance of the material averments of the petition.

No notice of the intended petition was given to the defendant. In compliance with the petition, the legislature granted to said company that they "be allowed to collect the same toll on carriages which carry the mails on said road, as they are now allowed, by their charter, to collect on other carriages of the same description." The defendant, in May, 1832, procured the repeal of the act of May, 1829, upon showing to the legislature, that when the said act was passed, he was carrying the mails over said road under contract as above stated, which fact was known to the plaintiffs and their agents, but that no notice was given to him of the application for said act, and that the rate of toll originally established was not so established by mistake, but for the purpose of encouraging the carrying of the mails in carriages. The plaintiffs were cited to appear, and were heard on the application for repeal. The tolls now claimed were charged at the rate fixed by the act of 1829. The questions involved in the case are sufficiently stated in the opinion. The facts were agreed on, and the case reserved for this court.

*Sherman and R. S. Baldwin*, for the plaintiffs.

*T. Smith and Seeley*, for the defendant.

WILLIAMS, C. J. The questions to be decided, are, had the plaintiffs a right to take increased tolls under the act of 1829? And if so, is that act repealed or annulled by the resolve of 1832.

It has been claimed, that the act of 1829 is of no force or efficacy; that it was obtained under such circumstances as to constitute moral fraud; that it was an attack upon the rights of the defendant, without any notice to him, and by suppression of the truth, and suggestion of falsehood. Whether the facts upon which the defendant relies in proof of this claim, are so placed before the court, as that we should be bound to regard them, is now a matter of inquiry. It is only alluded to, to show, that that point is not either admitted or denied. As the case has been argued upon the supposition, that the facts found by the general assembly are proved here, we will examine whether they are sufficient for us to say, that the act of 1829 was obtained by fraud. No notice was given to this defendant of the intended application for an alteration of tolls. We have a general statute regarding notice to be given, in all cases, to the adverse party, before trial. Now, if Parkes stood in the relation of an adverse party, then a grant made by the general assembly,

upon a petition, when he was not cited, would be, against him at least, null and void.

That he was in this situation has not been contended. So long as he chose to carry the mail upon this road in a stage-coach, he had an interest in having the tolls low; and so had every person who might in future carry a mail, in the same way. But it is not shown even that he was bound to carry the mail on the road, though it might be more convenient for him to do so. In carrying it there, he consulted his own convenience, and not any stipulation he had entered into.

If, then, the law did not require notice to be given him, it certainly would be too much for this court to say, that an application to the assembly for a franchise was fraudulent, because the petitioner had not given such notice. As was said in a case somewhat analogous, "the injury is to be ascribed to the law, not to the individual who has complied with its requisition:" 7 Cranch, 50. We do not say but that notice, in such cases, ought always to be required, that all may be heard, who feel any interest in the subject. The modern practice has been not to act in such cases until notice in a public newspaper has been given, that such a case is pending. But, it is believed, the first time that it has been urged, that unless it was given, the grant was void. Such a decision would destroy many of the ancient grants in this state; and is warranted by no authority whatever.

It is said, that there was a false suggestion, which ought to make void this grant. The petition states, that there was a mistake in recording the former bill, or in some other way, whereas it is now found, that there was no mistake, but it was designed to encourage mail carriers. Is this such a fraud as shall set aside a grant? It has been held that the facts stated in a bill in chancery are not evidence against the party filing it, in another case between the same parties, of the facts charged in it: *Doe d. Bowerman v. Sybourn*, 2 Esp. 496, 498; S. C., 7 T. B. 2.

But what are the facts charged in that petition? That a mistake was evidently made in recording the bill in form, or in some other manner: the toll being but six and one quarter cents, while other stage and pleasure carriages, with four wheels, are subject to four times that amount of toll. From the manner in which this allegation is made, it seems that the mistake charged was claimed to be proved, by the accompanying facts, viz., the disproportion in the toll to that upon other similar vehicles. It is said to be evidently made; and the proof offered is, that like carriages are charged four times as much. It is but the allega-



tion of the draftsman, supported, as he claims, by the facts. This inference may have been erroneous, but it does not, therefore, follow, that it was fraudulent. If this was all that was intended, the general assembly could draw their own inference as well as the petitioners. If they considered this sufficient proof of the fact, the inference certainly could not be deemed entirely unfounded. If there was other proof of the fact, that proof was either true or false. If false, the defendant ought to show it, before he can claim this was obtained on false suggestion; and if true, we surely can not say the suggestion in the petition was fraudulent, when there was proof to support it.

It was also claimed, that the petitioners suppressed the truth. They knew, it was said, that the defendant had made the contract with the postmaster-general to carry the mail; and that a mail had long been, and then was, transported on said road. Now it does not appear that the defendant was bound, by his contract, to transport the mail upon this road; though it does appear, he was obliged to transport it from New Haven to Norfolk and back. Of course it does not appear, that the petitioners knew that fact, or that it existed. There was, then, no fraud in not stating that fact. But they did know, that the defendant, in executing his contract, did in fact run his mail carriage upon this road, and had done so for years.

Nor was this fact one of that kind, which it was fraudulent to conceal. It is difficult to conceive of a fact more notorious than that a mail stage has, for a number of years, been running every day in the week, except Sunday, upon a great public road; and it is hardly possible to suppose, that a fact of such notoriety could have been concealed from a body of men, composed, like our legislature, of members from every town in the state. At all events, it would be too much to say, that because that fact was not made known to the assembly, it was fraudulently suppressed. Fraud is not to be presumed; and when this court are called upon, in this collateral manner, to declare void an act of the general assembly, upon the ground that it was fraudulently obtained, this fact should be clearly proved. In the opinion of the court, no such inference can be drawn from any one of these facts, or from all of them combined.

It is unfortunate that notice had not been required by the general assembly; but as they, in the exercise of a discretion which they had a right to exercise, have not done this, the court can not say that their act is void. On the other hand,

there is no doubt that this resolve gave a perfect right to these plaintiffs to collect tolls under it, while it remained in force.

This brings us to inquire, in the next place, whether that resolve has been annulled, by the one of 1832.

There can be no doubt of this, provided the legislature had the constitutional right, under the circumstances disclosed, to annul that act. By a most valuable provision of the constitution of the United States, no state can pass any law impairing the obligation of contracts. Such laws may sometimes be passed hastily, and without noticing what is to be their operation; or they may be passed upon occasions of great distress, under an idea that private interests must yield to public good, as was the case with the tender laws during the revolution. Under this provision of the constitution, it has been decided, that a grant is a contract, and, of course, can not thus be impaired. This has been solemnly adjudged by the supreme court of the United States, whose peculiar duty it is to settle constitutional questions: *Fletcher v. Peck*, 6 Cranch, 136, 137; *Dartmouth College v. Woodward*, 4 Wheat. 518. The former was a grant of land, the latter of a franchise; and both were held inviolable. Indeed, that a legislature can no more revoke its grants than a donor his gift, when delivered, is now to be considered as a principle perfectly well settled. Several years before the case of *Fletcher v. Peck*, it was said by one of our most eminent jurists, that "rights legally vested in any corporation, can not be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation;" *Wales v. Stetson*, 2 Mass. 146 [3 Am. Dec. 39]. The same principle was fully recognized by this court in the case of *The Enfield Toll Bridge Company v. The Connecticut River Company*, 7 Conn. 44, and by the supreme court of New York, in the case of *The People v. Platt*, 17 Johns. 215 [8 Am. Dec. 382]. Such a grant, it is said, vests an indefeasible, irrevocable title. Indeed, this general principle has not yet been denied.

But it is said that it does not apply to this case, because here was no consideration. The first answer to this is, that no case has been shown to prove, that a consideration is necessary. If that rule was to prevail, why is it necessary there should be any act of revocation at all? If a consideration was necessary, it would seem that the grant was void, for want of it, and, of course, needed no revocation. If good before the revocation, then it is not easy to see how the grantor could

avoid it. If good, it must be because the right had passed from the grantor to the grantee; and if it had once passed and a right vested, surely it could not be divested, at the pleasure of the grantor.

In the case of a gift by an individual, saying he gave an article, without delivery, it would be revocable; or, to speak more correctly, it never was given. But if the article is once delivered, it can no more be recalled than if he had received as a consideration the full value. This point was much considered, and elaborately discussed, by Story, J., in the *Dartmouth College case*. He says: "Where a contract has once passed *bona fide* into grant, neither the king, nor any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it, becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee:" 4 Wheat. 683. Again, this enlightened jurist says: "The government has no power to revoke a grant, even of its own funds, when given to a private person, or corporation, for special uses. It can not recall its own endowments granted to any hospital, or college, or city, or town, for the use of such corporations:" 4 Wheat. 698.

It is said, this question was not necessary to a decision in that case. It was a question argued at the bar, and which, therefore, fairly arose in the case; and an opinion, therefore, upon it, if not absolutely necessary to the result, was not an *obiter* opinion. Those who would question this opinion, should be able to produce some authority against it. Until that can be done, this court can have no hesitation in adopting it.

A case was cited from Com. Dig., that toll thorough, that is, toll on the king's highway, can not be claimed simply, without any consideration. If that doctrine is to be recognized here, and applies to a grant of toll not on the public highway, properly so called, but on the road where toll is now demandable, then it proves, that this toll could never have been legally taken under the act of 1829. But the question in England was rather as to the extent of the prerogative of the king, and it was held, that "the common law had so admeasured his prerogatives, that they shall not take away nor prejudice the inheritance of any:" Plowd. Com. 236. And in the case of *Davy*

v. *Allen*,<sup>1</sup> Noy, 176, it is said by counsel, to be agreed, that "the king can not grant toll to be taken in the highway, which is free; because it is to deprive the subject of his common right and inheritance:" 2 Wils. 229.

The legislative power in this country is not limited by the same rules as the prerogative of the king in England. It is rather to be compared with that of the parliament, except as it is limited by the constitution. This authority, therefore, is not applicable to a legislative grant.

But if it was, what is this grant? Is it to be considered as an original grant to a company, and a charge on the public without consideration? Or is it merely a modification of the original grant?

The turnpike company have granted to them a charter with a certain toll. This toll is found inadequate to the support of the road and a reasonable compensation to the proprietors. Can it be said, that an additional toll is without consideration? In this case, the company claimed it as a part of the grant originally intended to be made; and under this impression, doubtless, the general assembly granted it. So it is claimed by the defendant in another part of the case; and we do not see why this act (without reference to subsequent proceedings) may not be fairly considered as an explanation of the original act, and treated as a part of it. And in that point of view, there can be no foundation for the argument, that this is to be considered merely as a license. Whether it is considered as an explanation of the original grant, or an addition founded upon the idea that the tolls received did not form a reasonable compensation for the expenses, it is equally valid. It has been compared to cases of laws giving a bounty for the destruction of birds or beasts of prey, or providing a compensation to millers. General laws of this kind, for whole classes of men, have not been considered as in the nature of franchises or private grants. If, therefore, they are revocable, it will not apply to cases of this kind.

Whether any of these questions, as to the act of 1829, can be made, or whether the validity of that grant can be tried, except upon a process adapted specially to that purpose, are questions, which, in the view taken of the case, need not be discussed, as we are not disposed to question a legislative act any further than the exigencies of the case demand. But when it is claimed, that an act interferes with constitutional rights, the inquiry can

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1. *Darcy v. Allen*.

not be avoided without a gross dereliction of duty. The result of that inquiry has been that the act of 1832 can have no effect whatever upon the rights of the plaintiffs under the resolve of 1829. The court are thus imperatively bound to declare, that the act of 1829 remains unaffected and unimpaired, and that the plaintiffs have a right to collect the toll granted thereby.

We advise the superior court to render judgment for the plaintiffs.

The other judges concurred in this opinion.

Judgment for plaintiffs.

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CORPORATE CHARTER OR FRANCHISE IS A CONTRACT.—See *Lincoln Bank v. Richardson*, 10 Am. Dec. 34, conceded, on the authority of the principal case and others, in *West River Bridge Co. v. Dix*, 6 How. (U. S.) 542. So legislative grants of exemption from taxation: *Attwater v. Inhabitants of Woodbridge*, 16 Am. Dec. 46, and note; *Seymour v. Hartford*, 21 Conn. 486, citing the principal case and many others.

PRIVATE STATUTE OBTAINED BY FRAUD will be relieved against in a court of law or equity: *Campbell's case*, 20 Am. Dec. 360.

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## CAMP v. BATES.

[11 CONNECTICUT, 51.]

INJUNCTION LIES TO PREVENT WASTE UPON ATTACHED REALTY by an insolvent debtor, at the suit of the attaching creditor.

**BILL** for an injunction against waste. By the bill it appeared, in substance, that the plaintiff had brought an action at law against the defendant upon certain notes, which action was still pending, and had in said action attached certain realty of the defendant; that the defendant was wholly insolvent, and was committing waste on the attached premises by cutting down timber, etc., thus destroying the value of the security, etc., wherefore the plaintiff prayed an injunction. General demurrer to the bill, and the case was reserved for the advice of this court.

*Baldwin and Storrs*, for the demurrer.

*Hungerford and Wightman*, contra.

**WILLIAMS, C. J.** The question submitted to the court, in this case, is, whether a person having a debt against another, secured by note, and who has attached the real estate of that debtor to secure this debt, can obtain an injunction to prevent wanton waste to the property thus attached, when the debtor is insolvent.

On the part of the defendant, it is claimed, that the debtor has an estate of inheritance in the property; that the creditor has no legal interest in it; that it is uncertain whether he will ever obtain one; that his debt may be disputed, or it may be paid, or he may not choose to levy upon the land; and that it is not within the class of cases against which equity relieves; that no authority can be found to support it; and that our own authorities, so far as we have any, are against it.

Now, to determine whether this case is within the principle of the cases in which a court of equity relieves, it must be ascertained what are the rights of the plaintiff, and what the principles of a court in chancery. It is admitted, that by the attachment, the plaintiff acquires no legal title to the estate in question; and that he may, perhaps, never obtain one. It is not admitted, that a legal title is necessary. A mortgagor, who has parted with his legal title, may obtain this remedy against the mortgagee; or a second mortgagee, who has no legal title, may obtain it, against his mortgagor.

But it is further said, that this plaintiff has neither an equitable, nor a legal title. That he has no interest in the estate; none which a court of equity would consider a vested interest must also be admitted. What, then, are his rights? They are probably peculiar to the legislation of New England; they are not defined by the statute which creates them. It provides that attachments may be granted against the goods and chattels, or for want thereof, against the lands or person of a debtor; and after prescribing the mode of service, it provides, that unless so completed, the estate shall not be holden against any other creditor or *bona fide* purchaser. The necessary inference is, that this attachment, when so completed, shall hold the estate against such creditors or purchasers, as well as against the owner, to respond the judgment. We are not, then, to speculate as to the result, whether the creditor will recover at all, or recover the full sum which he demands. The estate thus attached, is to be holden to meet that recovery, be it more or less.

The statute intended to secure the debtor from mistaken attachments, by the bond it required. The common law will protect him from malicious attachments, as well of the estate as of the body. At all events, power is given (although no interest) to the creditor to secure his supposed demand. There is, indeed, no express restraint against alienation laid upon the owner; but it is impliedly made void. Now, if this is a fair

construction, that the debtor can not, under these circumstances, alienate the land, to the detriment of the creditor, can he any more alienate the houses situated upon it? Is not the one as fairly forbidden as the other? And if he can not alienate the buildings, he can have no greater right to alienate the timber growing thereon. The object of the privilege thus given to the creditor, was, that the property should remain sequestered for the payment of the debt. It need not, indeed, be taken into the hands of the officer, as personal property, because another mode, better adapted to give notice, is prescribed. But still it is as much in the custody of the law as the personal property attached. It may be truly said, the hand of the law is upon it. In the case of *Lacey et al. v. Tomlinson*, 5 Day, 77, 80, it is expressly laid down that "the attachment has no effect but to take the land into the custody of the law, to secure it against the alienation of the debtor, and the attachment of other creditors, and to hold it to be levied upon, by an execution, when judgment shall have been obtained."

The lands, then, upon which the waste complained of is committed, is the land of the defendant, taken into the custody of the law, to secure the plaintiff's debt. It is, in short, a pledge for the debt, taken by the creditor, not by the debtor's consent, but in pursuance of the provisions of law. It is a lien thus created.

The question then arises, does the law give this privilege and then leave the debtor to take it away or destroy it? Does the law give a privilege, and allow the party against whom it is given, to render it useless? Is a court of chancery so utterly impotent, or is it so fettered by its own rules, that this may be done, and the court have no power to prevent it?

This brings us to the consideration of the power of a court of equity. And although the general object of courts of justice is to give redress for injuries committed, it is the peculiar province of a court of equity to prevent the commission of injustice.

And when a litigation is pending, and there is danger that the property will be lost or injured, and the court wherein the suit is pending can not provide for its safety, or the common law affords no protection, a court of equity will interpose for its preservation: 2 Swift Dig. 133. Here a litigation is pending; the property appropriated under the law to await its termination, is likely to be destroyed, by one of the parties; and the common law affords no protection. It is, then, the very case for the interposition of a court of equity.

Again, it is a principle sanctioned by able English commentators, that courts of chancery grant injunctions against waste, to restrain acts against conscience or the existing rights of others: 1 Madd. Ch. 123, 126. Can there be a doubt, that the act here complained of, is an act against conscience and the existing rights of others? Did not the plaintiff, by his levy, acquire the sanction of law, that the property should stand pledged to await his judgment? Had he not then a right—a right acquired by this lien—a right which a court of justice is bound to respect and defend? It is not, indeed, a legal interest, which would pass by a release deed; but it is a right no less sacred, and no less regarded in a court of law. His right, in this case, is acquired under the same statute as his right to the personal property attached. That is protected, by the intervention of the officer, in whose custody it is placed. He is accountable to the creditor, if it is injured or destroyed. Here the same hand is not interposed, but the same general law is the guardian of both; and its protecting care can not depend upon the official strength with which the property is surrounded. In both cases, the laws of the land have given a right to an attaching creditor to appropriate the property attached to the payment of his debt, if he should obtain judgment.

It seems, then, as if it must follow of course, that the moment the property, either real or personal, is taken into custody of the law, the law must defend it against those who attempt to divert it from the object to which it has been thus devoted. The use of the property, during the pendency of the proceedings, it is true, remains with the debtor. The fact that the creditor has no vested interest in the property, would prevent his right to the use; and the expenses attending the cultivation of land, and the accounts to be kept, would make the occupation of little value to any one but the owner. The possessor, therefore, has always been suffered to remain unmolested, so long as he contented himself with ordinary returns. This seems necessary, that the property may not be abandoned; but it can confer no right to do such acts as are charged in this bill—acts of wanton, malicious waste.

The case, in principle, seems much like that of a mortgage. In both cases the land is appropriated as security for the debt. In both cases, the creditor has the right to take the land, or resort to other property, if it can be found. In both cases, the debtor may remove the lien, by payment of the debt. In both cases, the debtor may deny or disprove the existence of the debt.



Why, then, should not a court of chancery have the same power to prevent waste upon this property, in the one case as well as the other? If it is done in the one case, that the security given by the party should not be destroyed, it should be done in the other, that the security given by the law should not be destroyed. Surely, the law must be as anxious to guard its own enactments, as the provisions of the parties themselves.

It is said, that chancery never will do this against the owner, unless he is acting as trustee. The mortgagor can hardly be said to be acting as trustee; for he is, in equity, considered as owner. Nor is the rule confined to such cases; for even a tenant in tail, without impeachment or waste, has been restrained from wanton, malicious, or extravagant waste: *Vane v. Lord Barnard*, 2 Vern. 738; *Sir Herbert Packington's case*, 3 Atk. 217; *Strathmore v. Bowes*, 2 Bro. Ch. 89; *Chamberlyne v. Dummer*, 8 Id. 549.

It is said, this will not be done where the right is doubtful. On this demurrer, there exists no doubt as to the debt; it is admitted. But even were it denied, there is no doubt in the case: the plaintiff has a legal lien upon the property to await his judgment. This is not a matter of doubt. It may be doubtful whether he will recover the whole sum or even any part. The same doubt always may exist upon claims secured by mortgage; but this forms no objection to an injunction. How far this objection would be valid, where the debt was, in its nature, uncertain, or where the claim was founded upon a tort, it is not necessary now to determine, as this claim is of a different character.

It is said, the insolvency of the defendant makes no difference. It certainly adds great strength to the claim; because if there was an ample estate, or goods and chattels in abundance, to be found, there would be much less need of this summary remedy.

It was also claimed, that this was diverting questions from courts of law to courts of chancery. It is not apparent how the argument applies to this case, more than any other case, where application is made for injunction. The court, upon this summary proceeding, do not find facts, in such a manner, as to preclude the parties from contesting them before a jury; but must be so far satisfied with respect to them, as to deem it proper that the property attached should remain in the same situation that it was found in, to await the event of the judgment.

It was further objected, on the part of the defendant, that it

was completely sequestering the property in the hands of the debtor. It leaves him all the ordinary use of the property: it leaves him that power which a prudent husbandman ordinarily exercises over his property. It denies him a power of alienation, and a power of wanton destruction.

It is said, such power is not supported by authorities, but is opposed to them; and authorities are shown, in which it has been holden, that the creditor must perfect his title, before he can call on a court of equity for relief. Now, process of this kind is unknown in England or New York. There the creditor can obtain no lien upon the land, but by judgment; and having obtained judgment, there is no reason why he should not perfect his title, by levying his execution. The court, therefore, say, he must complete his title before he asks relief. But here the injury is done, while the law prevents his completing his title, after it gave him his lien; of course, there is no analogy between the cases; nor is there any decision shown, which can be considered as controlling this case. In our own courts, no case is cited, except two cases before single judges, at their chambers. Those opinions, however respectable, would not be authority in this court; and it is probable that the one was based upon the other. As the question is now before this court, unembarrassed by authority, it must be decided upon principle. The granting or continuing of the process must always rest in sound discretion, to be governed by the nature of the case: *Roberts v. Anderson*, 2 Johns. Ch. 205.

Unless there is some technical rule that prevents, there can be no doubt that this is a case, where, in the exercise of such a discretion, an injunction ought to be granted. A right or privilege conferred by statute, has been wantonly infringed; and an attempt is about to be made to deprive a party acting under that statute, of much of the benefit intended to be conferred by it.

The objections made at the bar can not prevail, but another, perhaps, may arise deserving consideration. In the case of *The Enfield Toll Bridge Company v. The Connecticut River Company*, 7 Conn. 50, Chief Justice Hosmer, after citing the case of *Roberts v. Anderson*, says: "If the right is not doubtful, an injunction will always be granted, to secure the enjoyment of a statute privilege of which the party is in the actual possession," and that he "does not find that chancery has gone beyond this limit." It may perhaps be said, that here the party was not in actual possession; and therefore, chancery will not interfere.

Now, where the privilege granted is one, which, from its nature, is capable of actual possession, the limitation may be correct; and in that case, the party to whom the franchise was granted, had neglected to take the actual possession. The principle, as applied to that case, was, therefore, undoubtedly correct. But the case cited did not demand, nor did the judge consider at all how it might have been, if a statute privilege was granted, and the party had done everything to make it available that the law required or permitted. Here, from the nature of the case, no actual possession of the property could be obtained by the creditor. But the writ of attachment gave to the creditor the statute privilege, and all the possession that the nature of the case admitted. The property is left in the possession of the debtor, just as in the case of a mortgage; but it is in view of the law, in the custody of the law itself; and being so, the law must protect those who are reposing upon its care.

The result is, that the superior court must be advised, that the plaintiff's bill is sufficient.

The other judges were of the same opinion.

Demurrer to be overruled.

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**INJUNCTION AGAINST WASTE LIES, WHEN.**—See *Scudder v. Trenton Delaware Falls Co.*, 23 Am. Dec. 756, and *Nevitt v. Gillespie*, 26 Id. 696, and other cases in this series cited in the notes thereto. To the point that an attaching creditor may have an injunction to prevent waste by the debtor, the principal case is cited, in *Crandall v. Gallup*, 12 Conn. 374 (incidentally); *United States v. Parrott*, McAll. 323; *Kennedy v. Scovil*, 14 Conn. 71. The case is referred to, also, in *Starr v. Plant*, 23 Conn. 384.

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## NEW LONDON BANK AND UNION BANK v. LEE.

[11 CONNECTICUT, 112.]

**PROPERTY MORTGAGED TO A SURETY TO SECURE HIM** for indorsing the mortgagor's note, whether such property be real or personal, may be subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent.

**WHERE THERE ARE MANY CREDITORS** having an interest in a controversy, some may sue in a court of equity in behalf of themselves and the others.

**COURT OF EQUITY WILL REQUIRE ALL PERSONS INTERESTED TO BE MADE PARTIES** to a proceeding affecting their interests; but although this is a general rule, it is subject to the discretion of the court.

**OBJECTION OF A WANT OF PROPER PARTIES, AFTER ANSWER FILED, and a report of the facts of the case by a committee, is unsustainable.**

**REMEDY AT LAW MUST BE CLEAR AND COMPLETE** where the existence of such remedy is made an objection to a resort to equity.

**REMEDY OF A CREDITOR BY EXECUTION IS NOT ADEQUATE**, so as to prevent a resort to equity to subject to payment of the debt, property mortgaged to a surety for such debt for his indemnity, where the debtor's whole property is under mortgage, and it does not appear that the equity of redemption possesses any ascertainable value.

**CREDITOR NEED NOT LEVY EXECUTION SO AS TO OBTAIN A LIEN** upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien on the property so mortgaged.

**BILL** to subject to the payment of certain debts due from H. & S. Lee to the plaintiffs, certain realty mortgaged by them to Samuel H. P. Lee, to indemnify him against liability as surety for the said H. & S. Lee for the same debts, as well as others. The facts reported by the committee were, in substance, as follows: During the year 1832, prior to October 16, the said H. & S. Lee made certain notes, payable at the New London bank, and certain other notes, payable at the Union bank, which were indorsed, for their use and benefit, by Samuel H. P. Lee, to whose order they were made payable. On October 16, 1832, before any of the notes became due, the said H. & S. Lee, in order to secure the said Samuel H. P. Lee for his indorsement of the said notes, as well as other obligations indorsed by him for their benefit, and for a certain book debt of three thousand dollars due from them to him, made a mortgage to him of all their realty in Connecticut. In May, 1827, the said H. & S. Lee and Samuel H. P. Lee made a mortgage to the Connecticut school fund of all their realty in Connecticut, except certain realty of the said Samuel H. P. Lee, to secure a certain debt of fifteen thousand two hundred and ten dollars, owing by them to said fund; and on the same day made another mortgage of certain lands in Ohio to secure the same debt. No part of said debt had ever been paid. The remaining realty of Samuel H. P. Lee in Connecticut had been mortgaged by him in December, 1829, and in October, 1832, to secure certain debts, and said mortgages had been foreclosed, and the property sold. The notes held by the plaintiffs having matured, payment was demanded, default made, notice given to the indorser, and judgments recovered thereon, in February, 1833, against the makers and indorser. Executions were issued thereon, and returned unsatisfied, for want of property on which to levy, aside from that included in the several mortgages before mentioned. H. & S. Lee were reported by the committee to be insolvent, and were still in possession of the realty mortgaged to Samuel H. P. Lee. The bill prayed a decree requiring a conveyance to the plaintiffs, of the said mortgaged property, or so much thereof

as they were entitled to receive, or that the property be sold, and the proceeds applied to the payment of the debts named in the mortgage, and for general relief. All the creditors named in the mortgage, except the plaintiffs, were made defendants. The case was reserved for the advice of this court. The questions involved sufficiently appear from the opinion.

*Strong and W. P. Cleaveland, jun., for the plaintiffs.*

*Goddard and Isham, for the defendants.*

*Rockwell, for certain creditors.*

CHURCH, J. That the debts of the plaintiffs are justly due, and such as the defendants, H. and S. Lee, are bound, as well at law as in conscience, to pay, is undisputed; and the important question is, whether the remedy sought is such as a court of equity will apply.

The original debtors, H. and S. Lee, by their mortgage deed to Samuel H. P. Lee, of sixteenth October, 1832, made to indemnify him against these demands of the plaintiffs, as well as against the claims of others, as averred in the bill, and described in the condition of said mortgaged deed, appropriated the estate thus described as a fund, to secure the payment of the several debts there mentioned. This fund has never been applied to its object; the debts remain unpaid; and the purpose of the bill is, to enforce the application of the fund.

The principles upon which the plaintiffs, in their present application, rely, in support of the remedy they seek to enforce, are familiar to courts of equity. Does the present case fall within their operation?

It has long been settled, and is conceded in argument here, that a surety who has paid the debt, may well claim all the funds appropriated for its payment remaining in the hands of the creditors. The plaintiffs insist, that the same reasons and equities apply, with equal strength, to their case, wherein they, as creditors, seek to apply the funds in the hands of the surety to the payment of the debts. And so we think. In both cases, the security or fund is created for the payment of the debt, and is a trust existing for that specific purpose; and whether the creditor, as in the former case, or the surety, as in this, be the trustee, is very immaterial. The trust is created ultimately for the benefit of the creditor, or of him who stands in his place, by having paid the debt: *Mayhew v. Crickell*, 2 Swans. 191; *Ex parte Gee*, 1 Glyn & J. 330; *King v. Baldwin et al.*, 2 Johns.

Ch. 554; 2 Swift Dig. 151; *Wright v. Morley*, 11 Ves. 12; 1 Law Library, 150; *Miller et al. v. Ord*, 2 Binn. 382. And this principle has been frequently applied to cases like the present. It was holden, more than a century ago, in the case of *Maure v. Harrison*, 1 Eq. Cas. Abr. 93, that a bond creditor shall have the benefit of all counter bonds, or collateral securities given by the debtor to the surety. And this principle has ever since been recognized as elementary in courts of equity. The cases on this subject are all collected and well considered by Bissell, J., in the case of *Homer v. Savings Bank of New Haven*, 7 Conn. 478; and they entirely establish the general doctrine for which the plaintiffs contend; and their authority this court recognizes. Nor are they to be distinguished from the present case, because they are conversant about personal, and not real, estate: *Russell v. Clark's Ex'rs*, 7 Cranch, 69; *Moses v. Murgatroyd et al.*, 1 Johns. Ch. 119 [7 Am. Dec. 478]; *Phillips v. Thompson*, 2 Id. 418 [7 Am. Dec. 535]; *Kip v. Bank of New York*, 10 Johns. 63, 65; *Wright v. Morley*, 11 Ves. 21; *Craythorne v. Swinburne*, 14 Id. 162; 1 Law Library, 150.

But the defendants contend, that if the general doctrine, as applicable to cases of the general character of the present, be conceded, as claimed by the plaintiffs, yet, in this case, special objections exist against any recovery by them under this bill. And,

1. That the other creditors of H. & S. Lee, against whose demands Samuel H. P. Lee was also indemnified, by the same mortgage of October 16, 1832, are not made parties plaintiffs in this case; and no reason is assigned why they are not. The interest of the several creditors named in the aforesaid mortgage, although similar, is not joint; and no one of these creditors can act for the others, without their consent. The remedy sought by this bill is, essentially, as well for the benefit of these other creditors, as for these plaintiffs; and the bill, though not in form, is, in substance, as well in their behalf, as in behalf of the plaintiffs. Its prayer is, that the property mortgaged be sold, and the avails applied to the payment of the debts for which it was pledged; and the cases are very frequent, in which it has been holden, that where a question is in controversy is of general interest to many creditors, some may, in a court of equity, sue in behalf of themselves and the others: *Mitt. Pl. 224*; *Elmendorf v. Taylor et al.*, 10 Wheat. 152; *West v. Randall*, 2 Mason, 181; 1 Cond. U. S. R. 507, *in notis*; *Routh v. Kinder*, 3 Swans. 144; *Boddy et al. v. Kent et al.*

1 Meriv. 361; *Weld v. Bonham*, 2 Sim. and Stu. 91; *Hanford v. Storie*, Id. 196; *Lloyd v. Loaring*, 6 Ves. 779; *Brown v. Ricketts et al.*, 3 Johns. Ch. 553; *Hallett v. Hallett*, 2 Paige, 15.

In cases where several individuals and interests are concerned, a court of equity will in general require all parties interested to be made parties in a proceeding affecting such interests, either as plaintiffs or defendants, for the purpose of preventing further and unnecessary litigation, as well also that a decree may be formed, which shall be safe for all who are bound to perform it. But even this rule is subject to the discretion of the court: *Elmendorf v. Taylor*, 10 Wheat. 152; *Mallon et al. v. Hinde*, 12 Wheat. 193; Mitf. Pl. 164. And in this case, the other creditors are parties, though not plaintiffs: they are before the court, and may be bound by any decree which may be made, as well as if they had been joint plaintiffs with the present plaintiffs, or as well as if they had been called in as is frequently necessary, by order of court, during the progress of the proceedings: Mitf. Pl. 11, 164; *Hendricks v. Robinson et al.*, 2 Johns. Ch. 283.

Besides, it may well be doubted, whether an objection for want of all the proper parties, should be permitted at this stage of the cause. An answer has been made to the bill; a committee has made its report of the facts in the case; after which, for the first time, this objection is interposed. The court will not dismiss the bill, even if it should believe more parties to be necessary, but would direct it to stand over that they might be added. After all the expenses of this litigation have been incurred, it would be unreasonable to make such order; and indeed, the defendants have not requested it. Upon every consideration, therefore, this objection for want of parties, is unsustainable: *Russell et al. v. Green*, 10 Conn. 269; *Nash v. Smith et al.*, 6 Id. 421; *Anon.*, 2 Atk. 15; *Jones v. Jones*, 3 Id. 111; *Harding v. Handy*, 11 Wheat. 103.

2. That the plaintiffs have adequate remedy at law. To render this objection available, it must be shown, that the pretended remedy at law is clear and complete: Mitf. Pl. 25, in *notis* (Am. ed.); *Weymouth v. Boyer*, 1 Ves. jun. 416; *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 Johns. 384 [8 Am. Dec. 215]. The supreme court of the United States, in discussing this subject, in the case of *Bcyce's Ex'r v. Grundy*, 3 Pet. 215, say: "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt ad-

ministration, as the remedy in equity." If, in the present case, the court could even see, that the plaintiffs have a nominal remedy at law, by levying their executions upon an equity of redemption of some probable and yet unascertainable value; yet, if we believe, that such proceedings can not probably be made to result in any substantial advantage to the plaintiffs, they ought not now to be turned round to seek such fancied legal remedy.

But that the plaintiffs have a nominal legal remedy, does not appear from the facts here disclosed. The whole real estate of H. & S. Lee, the principal debtors, as well as of Samuel H. P. Lee, the surety, before the execution of the mortgage of the sixteenth of October, 1832, was mortgaged for very large sums of money; and whether an equity of redemption of any value remained, we are not informed. But if an equity of redemption existed, what was its situation?

The lands of the Lees, both debtors and sureties, in this state and in Ohio were mortgaged to secure an entire debt due to the Connecticut school fund, of fifteen thousand two hundred and ten dollars; the lands in each state being separately holden for the entire debt. Supposing what may be true, that the whole lands are of greater value than the whole debt; still, if the lands in Connecticut are not worth more than the whole debt, there is no equity of redemption here (and the same is true of the lands in Ohio), which can be taken and applied to these debts, by the unassisted operation of the levy of the plaintiffs' executions. In searching for the plaintiffs' remedy at law, by the levy of their executions (and no other is suggested), it will be found, that all the estate of H. & S. Lee, constituting this fund, is also under the incumbrance of this mortgage of Samuel H. P. Lee, of the sixteenth of October, 1832. How is the amount of this incumbrance to be ascertained? It can not be to any practical or beneficial purpose. It is a mortgage to indemnify against unpaid debts. Its amount can not be determined, until the debts, including these debts of the plaintiffs, are paid. Appraisers could [not] well estimate this equity of redemption, if the executions were levied upon it.

Such, therefore, is the embarrassed state of the property of the Lees, that we do not believe the plaintiffs have any adequate remedy at law, by the levy of their executions. It was suggested in argument, that it does not appear, that the Lees are insolvent; and that therefore, a remedy still remained at law to the plaintiffs for the collection of their debts.



The bill does aver, and the committee have found, that H. & S. Lee are insolvent; and from the peculiar situation of the estate of Samuel H. P. Lee, as found by the committee, we can very well see the great improbability of enforcing payment of these debts, by a resort to legal process against his body. It is not for H. & S. Lee, the principal debtors in this case, to say, that a remedy may be had against the body of the surety; and such an objection comes in a very inequitable character from Samuel H. P. Lee, while he is refusing to pay or appropriate the pledge, and is setting these creditors at defiance: *Middletown Bank v. Russ et al.*, 3 Conn. 135 [8 Am. Dec. 164].

A very legitimate object of equity jurisdiction is the prevention of circuitry of action and of ruinous litigation. These creditors ask, what the Lees can not equitably withhold or deny, that they may be substituted in the place of the mortgagee, and as such avail themselves of the benefit of the mortgaged estate, as far as it can be made available, without the delay and expense of protracted and doubtful litigation, in payment of their debts. Mortgagees may go upon the pledge, if they please, without regard to the solvency or insolvency of debtors or sureties. Equitably, these creditors are the mortgagees. The mortgage was made for their ultimate benefit; and as we have already seen, is a trust fund for them. We see no necessity, nor even propriety, of sending these plaintiffs to make an experiment upon the body of Samuel H. P. Lee.

3. It was finally objected, that as these creditors had not levied their executions, and so had not thereby obtained a lien upon the property mortgaged, they had no preferable claim to other creditors of H. & S. Lee, to call for the remedy here sought. If the views heretofore expressed of the nature and objects of the mortgage of the sixteenth of October, 1832, be correct, this objection is without force. We have seen, that the mortgaged property was a fund created and set apart for a specific purpose, the payment of the debts described in it, and constituted a trust for their payment. These plaintiffs, therefore, are not the general creditors of H. & S. Lee, without a lien, but they and the other creditors named in the mortgage, have an equitable lien upon the estate mortgaged; and the purpose of their bill, is, to render it efficient. The cases relied upon, by the defendants, Lees, in support of this position, had no application to the present case.

Samuel H. P. Lee is one of the creditors of H. & S. Lee. They owed him three thousand dollars, secured by the same mortgage

of October 16, 1832. These petitioning creditors have no claim upon that debt. It was no part of the fund intended for their benefit. Nor have they any superior equity attachable upon the fund intended for the equal benefit of all, to entitle them to postpone this debt to their own. The mortgage was created for the equal benefit of all the creditors named in it; and all, including Samuel H. P. Lee, are to be equally interested in the avails of the property appropriated by it.

We are of opinion, therefore, that the superior court should be advised, that a decree in this case be made in favor of the plaintiffs, that unless their debts be paid, within such reasonable time as the superior court may determine, some suitable person be appointed, by said court, and empowered to sell the mortgaged estate, and pay the avails thereof into that court, for the benefit of the plaintiffs, Samuel H. P. Lee and all the other creditors named in the said mortgage deed, in proportion to their several debts, and subject to the future order of said court.

WILLIAMS, C. J., and BISSELL, J., were of the same opinion.

HUNTINGTON and WAITE, JJ., gave no opinion, having been of counsel in the cause, and otherwise disqualified to judge therein.

Decree for the plaintiffs.

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COLLATERAL SECURITY TO AN INDORSER INURES to the benefit of the creditor, in equity, and he may enforce the trust arising therefrom: *Moses v. Murgatroyd*, 7 Am. Dec. 478; *Phillips v. Thompson*, Id. 535. So an indemnity created for a surety's benefit, may be reached in equity by the creditor: *King v. Harman's Heirs*, 26 Id. 485. So a surety, who has paid the debt, may reach in equity any fund set apart for the payment of such debt, whoever the trustee or *cestui que trust*: *Rodes v. Crockett*, 24 Id. 489; and see, also, as to the right of the surety, who has paid the debt, to resort to security taken by the creditor: *Hayes v. Ward*, 8 Id. 554; *Creager v. Brengle*, 9 Id. 516. Co-sureties are not entitled to the benefit of an indemnity taken by a surety, until he has been fully repaid: *Moore v. Moore*, 15 Id. 523. The principal case is cited in *Belcher v. Hartford Bank*, 15 Conn. 383; *Lewis v. De Forest*, 20 Id. 443; *Warren v. Helm*, 1 Gilm. 231; and *Stevenson v. Austin*, 3 Metc. 485, as an authority in favor of the right of a creditor, or of a surety, who has paid the debt, to come into equity to obtain the benefit of property mortgaged or pledged to secure payment of the debt. The case is distinguished on the same point in *Jones v. Quinnipiack Bank*, 29 Conn. 44. So in *Post v. Trademen's Bank*, 28 Id. 429, where it is held that there is nothing in the doctrine of the principal case to prevent an indorser who has received indemnity from surrendering the same, if it be done fairly before the debtor has become insolvent, or any equities have vested by subrogation or otherwise.

OBJECTION OF A WANT OF PROPER PARTIES in an action or suit, when and how to be taken: See *Baker v. Jewell*, 4 Am. Dec. 162; *Gordon v. Goolwin*, 10 Id. 573; *Bell v. Layman*, 15 Id. 83; *Le Page v. McCrea*, 19 Id. 469; *Gil-*

*bert v. Dickerson*, 22 Id. 592; *Robinson v. Smith*, 24 Id. 212; *Jones v. Pitcher*, Id. 716; *Mayor of New Orleans v. Ripley*, 25 Id. 175; *Marshall v. Jones*, Id. 280. That an objection of a defect of parties plaintiff comes too late after the appointment of a committee and an investigation on the merits, is held, citing the principal case in *Bunnell v. Read*, 21 Conn. 593; *Chipman v. Hartford*, Id. 499; *Ashmead v. Colby*, 26 Id. 308. So that where persons are omitted who should have been made parties, they should be summoned in, and that this is no ground for dismissing the bill, in *Hunt v. Mansfield*, 31 Id. 493.

ONE CREDITOR OR LEGATEE MAY SUE IN BEHALF OF ALL OTHERS similarly situated, when: *Egberts v. Wood*, 24 Am. Dec. 236 and note. *New London Bank v. Lee* is recognized as an authority on this point in *Saunders v. Denison*, 20 Conn. 525, and *Potter v. Holden*, 31 Id. 395.

THAT THE REMEDY AT LAW MUST BE OBVIOUS and complete to prevent a resort to equity, the principal case is cited in *Ferguson v. Fisk*, 28 Conn. 511; and *Swift v. Larrabee*, 31 Id. 238.

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## BELKNAP, ADM'R OF GLEASON, v. GLEASON.

[11 CONNECTICUT, 160.]

STATUTE OF LIMITATIONS DOES NOT OPERATE IN A COURT OF EQUITY, *proprio vigore*, but courts of equity will not lend their aid to claims which are barred in a court of law.

EQUITABLE REMEDY IS LOST ONLY WHERE THE ANALOGOUS legal remedy is barred by statute.

MORTGAGE MAY BE ENFORCED IN EQUITY ON A NOTE BARRED BY STATUTE if the period necessary to bar an ejectment at law for the land has not elapsed, and the note is still unpaid.

DEBT IS NOT CANCELED BY THE RUNNING OF THE STATUTE OF LIMITATIONS, which is merely a statute of repose, but the remedy only is suspended.

NO PRESUMPTION OF PAYMENT ARISES FROM THE RUNNING OF THE STATUTE on a promissory note, so as to cut off the creditor's right to enforce a lien given to secure such note.

INFERENCE IS THAT A NOTE BARRED BY STATUTE IS UNPAID when the creditor comes into equity to enforce a mortgage given to secure the same, and it appears that there is no fact other than the lapse of time to warrant a presumption of payment, and that the debtor had no property other than the land mortgaged.

FINDING IN SUCH A SUIT THAT THE DEBT IS UNPAID WILL NOT CONCLUDE the defendant from setting up the statute in an action on the note.

BILL filed in January, 1835, to enforce a mortgage given to secure certain notes made April 17, 1817, by the defendant to the plaintiff's intestate, and payable in two and five years, respectively. Pleas, the general issue, payment, and the statute of limitations. It appeared that more than six years had run since the notes became due; that a certain sum still remained unpaid on them; that the mortgaged property was the only property

owned by the defendant at and after the making the notes, and that the mortgage might have been foreclosed at any time after the notes became due. Case reserved for the advice of this court.

*Hungerford*, for the plaintiff.

*W. W. Ellsworth*, for the defendant.

WILLIAMS, C. J. Two questions arise upon the facts in this case: Is the statute of limitations applicable to it? and, Is there a legal presumption of payment?

As to the first: That no action of law will lie upon these notes, if the statute of limitations is pleaded, can not be doubted. Nor can it be claimed, that this statute, *proprio vigore*, shall operate in a court of equity. But it is claimed, that in analogy to the proceedings at law under that statute, a court of equity will apply it, when the claim comes before that court.

There is no doubt that courts of chancery will not lend their aid to claims which are barred in a court of law: 4 Kent Com. 187; *Lansing v. Starr*, 2 Johns. Ch. 150; *Roosevelt v. Mark*, 6 Id. 289; *Kane v. Bloodgood et al.*, 7 Id. 90 [11 Am. Dec. 117].

But these cases do not prove, nor does the principle require, that when a creditor holds different instruments to secure the same debt, if the remedy upon one of them is barred at law, the remedy upon all is barred in equity; the rule being analogous to the rule of law. The question would then seem to be, does the statute of limitations take away all remedy at law? It is not uncommon that a party may have one remedy, when he has lost the benefit of another. Thus, it was formerly holden, that trover would lie for an article taken wrongfully, although the action of trespass was barred by the statute: *Ferriss v. Ferriss*, 1 Root, 365. So an action will lie upon an adjustment of accounts, although book debt is barred: *Ashley v. Hill*, 6 Conn. 246. So if a horse is taken under such circumstances that trespass will lie, it has been decided, that an action of assumpsit may be brought for the avails of the sale, although trespass was barred by the statute: *Lamb v. Clark*, 5 Pick. 193.

Here the debt is secured by notes and a mortgage, each of which requires different remedies, all of which may be pursued at the same time. Assumpsit upon the notes must be brought within six years; an action of ejectment for the land may be brought within fifteen years. In this state, where payment after the law day will not defeat an action of ejectment by the

mortgagee, it will not be pretended, that that action would be defeated, by the statute of limitations affecting the note. What analogy requires a court of equity to say, that the remedy at law is gone, and therefore, there is none in chancery? One remedy is indeed gone, and one only. The mortgagee may get and hold possession of this land, by virtue of his legal rights. With what face could the debtor come here for relief? His case, if truly disclosed, would be this: "I owed this debt; gave my notes for it; and mortgaged my land to make it more secure. The creditor, by his kindness or his negligence, has suffered his notes to be barred, by the statute of limitations, and is attempting to collect his debt out of the only remaining security. I have not paid it; but I pray this court, as a court of equity, since the creditor has lost one security, to prevent his making use of the other." The ready answer to this claim, is, that if the statute of limitations protects the debtor at law, he does not need the aid of a court of equity. If it does not, this court ought not, by analogy, to extend this statute to cases where courts of law are not required to do it.

In the high court of chancery in Maryland, it has been expressly decided, that not less than twenty years can operate as a bar of a mortgage or equitable lien, although the bond or note may be barred by twelve or three years: *Lingan v. Henderson*, 1 Bland, 282.

Our statute of limitations operates upon negotiable notes in six years; upon notes not negotiable in seventeen years; upon entries on lands in fifteen years. Now, if a note not negotiable is secured by real estate, and is suffered to lie, without payment of interest and without entry on the lands, for sixteen years, the benefit of the mortgage is lost; but the note remains a subsisting and available security. Had the note been negotiable, and lain more than six years, but less than fifteen, the note would have been subject to the operation of the statute; but the creditor might get possession of the lands. But the remedy now sought is neither a suit upon the notes, nor an action of ejectment for the lands; and of course, neither of the statutes barring those remedies, is strictly analogous. The object sought by the foreclosure, is payment of the notes. The means, however, by which it is sought, is through the medium of another security—that of lands. It is, therefore, much more analogous to the remedy by ejectment at law. There the creditor, by the possession of lands, procures payment of the debt. Here, unless the debt is voluntarily paid by the debtor,

the decree in effect gives him the land in satisfaction of the debt. The operation of the decree upon the notes, is merely incidental; but upon the land, it is direct and operative. It is true, that the mortgagee must also show, that the notes are unpaid. Whether he can do that, under the circumstances of this case, will form the next inquiry

It is said, there is no debt subsisting; and that, of course, a court of chancery can not act. This presents the question, whether the statute of limitations annihilates the debt, or only suspends the remedy.

The statutes of limitations are statutes of repose. They suspend the remedy, but do not cancel the debt: *Lord v. Shaler*, 3 Conn. 121, 134 [8 Am. Dec. 160]. They are statutes founded upon principles of policy: "*Interest reipublicæ ut finis litium.*" The debt remains, and a suit may be brought upon it, and supported by a subsequent promise. It is said, that the statute relative to lands, not only prevents an entry, but confers a title. Such has been the construction of our statutes; but as it respects personal actions, the construction has been uniform, that the debt is not affected. The words of the statute seem to justify, and indeed require such construction: "No action of account, of debt on book, or on simple contract, etc., shall be brought, except," etc.

It has indeed been often remarked, by judges, in giving their opinions, that the statute was made to protect persons, who were supposed to have paid their debt, but had lost the evidence of it: *Mountstephen et al. v. Brooke et al.*, 3 Barn. & Ald. 141; S. C., 5 Serg. & Lowb. 245. Or that the debt shall be presumed to be paid: *Thornton v. Illingworth*, 2 Barn. & Cress. 824; S. C., 9 Serg. & Lowb. 257; *Dowthwaite v. Tibbut*, 5 Mau. & Sel. 75; *Thompson, Adm'r, v. Peniman*,<sup>1</sup> 8 Mass. 133. But that they do not mean by this, that at law the statute of limitations is sufficient evidence of payment, is apparent from the fact, that upon the plea of payment, the statute of limitations was never considered as sufficient evidence. And where twenty years have elapsed, it has been held that payment of a bond might be presumed: *Oswald et al. v. Legh*, 1 T. R. 270. But no case is produced from the English books, where a shorter term has been held, of itself, sufficient. An authority from a neighboring state, however, is brought to show, that payment may be presumed after six years only, if the statute bar the claim at that time, in analogy to the presumption of payment of specialties after

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1. *Baxter v. Peniman*.

twenty years. The highly respected judge, who gives this opinion, acknowledges he knows no express adjudication for it; and although he thinks it results from well-established principles, yet in the close of his opinion, he says, "Perhaps, I have stated the case too strongly, that in a case like this, payment may be presumed from the mere fact that more than six years have elapsed;" evidently doubting whether he had not gone too far.

The case itself was an action of ejectment for land mortgaged; and the notes having lain more than six years after they were due, no action could be sustained upon them, as in that state it has been held, that no action at law will lie for the land after payment. The judge at the circuit nonsuited the plaintiff, upon the ground that he could not recover upon the notes. The court however held, that this opinion was incorrect; that the time did not prove payment, but was only evidence of it, in connection with other circumstances: *Jackson d. Sackett et. al. v. Sackett and Raymond*, 7 Wend. 94. If, therefore, the doctrine of that case was to be applied to the case before the court, it would only prove, that the length of time was evidence, strong presumptive evidence, that this debt was paid. But when we find no other fact to strengthen that presumption, and when we find that this mortgagor had no property, except this very land, to pay the debt, the inference we should feel bound to draw, would be, that the debt remained unpaid.

But is the principle of this case supported by authority? In one case Lord Ellenborough held, that he would extend the doctrine of presumptions applicable to bonds to promissory notes, that is, that payment should be presumed, not in six, but in twenty years: *Duffield v. Creed*, 5 Esp. 52. In a more recent case, however, Abbott, C. J., held that the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contract debts, and subject to the provisions of the statute of limitations, whereas the rule for presuming payment of a bond after twenty years, was founded upon the common law; there being no statutory provision with respect to obligations of that nature; and therefore, without some decisive authority upon the point, he would not charge the jury that there was such a presumption: *Du Belloix v. Lord Waterpark*, 1 Dow. & Ry. 16; S. C., 16 Serg. & Lowb. 12.

Although the principle of presumption of payment, by the lapse of twenty years, has been long since settled in England; and although courts of equity have adopted, many years since, the principles of the statutes of limitations, and applied them

to cases before those courts: 4 Kent Com. 187; yet it seems not settled, at the present time, whether this principle applies to mortgages; whether a mortgage shall be presumed to be satisfied, by a possession of the mortgagor for over twenty years, without payment of interest, demand, or acknowledgment. This question was discussed by the master of the rolls in *Christophers v. Sparke*, 2 Jac. & W. 231, 234. He avoids deciding the point, but says he can not accede to the doctrine that no length of time will operate against a mortgagee, who has been out of possession, without claim or acknowledgment. If the doctrine of *Jackson d. Sackett v. Sackett and Raymond* was law in England, surely there could have been no reason for doubt in the case of *Christophers v. Sparke*.

But it has been expressly decided, that the security of a lien was not impaired, in consequence of the debt's being barred by the statute of limitations. Where a wharfinger claimed a lien upon goods in his possession for a balance of account, it was held, by Lord Eldon, that "if what was said by the defendant's counsel, be law, that the debt was discharged, by the operation of the statute, no lien could be obtained, by reason of it; but the debt was not discharged, it was the remedy only. I am," says he, "of opinion, that though the statute of limitations has run against a demand, if the creditor obtains possession of goods, on which he has a lien for a general balance, he may hold them for that demand, by virtue of the lien:" *Spears v. Hartly*, 3 Esp. 81.

So in the case of *Higgins v. Scott*, 2 Barn. & Adol. 413; S. C., 22 Serg. & Lowb. 113, where an attorney had a lien upon a judgment; his debt being barred, by the statute of limitations, it was contended, that his lien was gone; but the court held, that the statute of limitations barred the remedy, not the debt; and that Hyatt, the attorney, who had taken no steps to recover his costs for six years, had still a right to be paid from the sale of the goods.

These are both cases of personal property. But surely there can be no reason applicable to personal estate, not equally applicable to real. The statute of limitations must have the same effect in one case, as in the other; and the hold of the creditor, in both cases, must depend upon the existence of the debt. And surely, if there had been a different rule in courts of equity as to real estate, it would have been alluded to in these cases.

The principles of these decisions are in entire accordance with the practice in this state, and the decisions of our courts, so far as they are known; and we think they ought to be de-



cisive of the case, unless another objection, which has been made, ought to prevail.

It is said, that the court must, if they pass a decree in this case, find, that there is a debt due to the plaintiff; and that the fact thus found, will conclude the defendant, in another action at law, should there remain a balance, after the mortgaged estate is exhausted; and thus the statute of limitations will in effect be nullified. This ground, however, is not tenable. The court must indeed find, that the debt is unpaid; but still this does not settle the question at law, that it is not barred by the statute of limitations. According to the views before expressed, these are entirely distinct questions. The debt may not have been paid; but still the statute may have attached upon it, unless it has been waived, by the defendant. This finding, therefore, will be utterly immaterial, when the question is, whether the debt is barred by the statute of limitations.

Upon the whole, this court is satisfied, that the plaintiff is entitled to a decree, and so advise the superior court.

The other judges concurred.

Decree for the plaintiff.

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**LIMITATIONS IN EQUITY.**—This subject is discussed at length in the note to *Frame v. Kenny*, 12 Am. Dec. 368. See also, *Wanmaker v. Van Buskirk*, 23 Id. 748, and other cases cited in the note thereto, and *Collard's Adm'r v. Tuttle*, 24 Id. 627.

**PRESUMPTION OF PAYMENT FROM LAPSE OF TIME.**—See *Bailey v. Jackson*, 8 Am. Dec. 309; *Henderson v. Lewis*, 11 Id. 733 and note; *Gulic v. Loder*, 23 Id. 711; *Wanmaker v. Van Buskirk*, Id. 748.

**STATUTE OF LIMITATIONS BARS THE REMEDY BUT NOT THE RIGHT.**—*Commonwealth v. McGowan*, 7 Am. Dec. 737; *Ludlow v. Van Camp*, 11 Id. 529 and note.

**THAT MORTGAGE TO SECURE A NOTE BARRED BY STATUTE**, or a pledge to secure such note, may be resorted to in equity, notwithstanding the fact that the remedy on the note is lost, is a point to which the principal case has been often cited: *Haskell v. Bailey*, 22 Conn. 573; *Hough v. Bailey*, 32 Id. 289; *Wright v. Leclaire*, 3 Iowa, 231; *Ozmun v. Reynolds*, 11 Minn. 473; *Trustees of Jefferson College v. Dickson*, Free. Ch. (Miss.) 482; *Savings Bank v. Ladd*, 40 N. H. 463; *Gary v. May*, 16 Ohio, 66; *Fisher's Ex'r v. Mosseman*, 11 Ohio St. 46; *Sparhawk v. Buell's Adm'r*, 9 Vt. 74; *Pitzer v. Burns*, 7 W. Va. 77; *Almy v. Wilbur*, 2 Woodb. & M. 403. In *Fisher's Ex'r v. Mosseman*, 11 Ohio St. 46, the court say: "A discussion of the question on principle, and a review of the authorities bearing upon it, would be a work of supererogation, after it has been so thoroughly done already in *Belknap v. Gleason*, and we content ourselves with saying, that it seems to us that that case was correctly decided, and that it is decisive of the one before us on the point under consideration."

In *Duval's Heirs v. McLoskey*, 1 Ala. 746, the case is cited to the kindred point, that the validity of a mortgage is not impaired by a failure to present the note secured thereby to the administrator of the deceased mortgagor within the time limited by statute.

## LYMAN v. HALE.

[11 CONNECTICUT, 177.]

TREE STANDING WHOLLY ON ONE'S LAND, BUT EXTENDING ITS ROOTS INTO, and its branches over, the land of another, belongs nevertheless to the former proprietor, and the latter is liable for the taking and conversion of fruit growing on the branches of such tree, which overhang his land.

TRESPASS *quare clausum fregit* against the defendant, for entering upon the plaintiff's land and taking and converting to his own use a quantity of pears. The action was brought originally in the county court. It appeared that the pears in question were gathered from branches, overhanging the defendant's land, of a certain pear-tree growing on the plaintiff's land about four feet from the line, some of the roots of which extended into the defendant's land. The plaintiff had, for twenty-five years, and until the trespass complained of, exclusively gathered and appropriated the pears growing on all the branches of said tree, and claimed, that by reason of his ownership of the land on which the tree stood, or by reason of his exclusive use and appropriation of the fruit of the said tree, he was the exclusive owner of the tree and its fruit. The defendant claimed to be a tenant in common with the plaintiff of the said tree. The instructions of the court on this point were in favor of the defendant. Verdict for the defendant. The plaintiff brought a writ of error in the superior court, and the judgment being there affirmed, he brought the case here by a motion in error.

*Hungerford and Cone*, for the plaintiff in error.

*Johnson and Chapman*, for the defendant in error.

BISSELL, J. This writ of error is reserved for our advice; and the principal question raised and discussed, is, whether, upon the facts disclosed on the record, the plaintiff and defendant are joint owners, or tenants in common, of the tree in controversy.

It is admitted, that the tree stands upon the plaintiff's land, and about four feet from the line, dividing his land from that of the defendant. It is further admitted, that a part of the branches overhang, and that a portion of the roots extend into, the defendant's land. If then he be a joint owner of the tree with the plaintiff, he is so, in consequence of one or the other of these facts, or of both of them united. It has not been insisted

on, in the argument, that the mere fact, that some of the branches overhang the defendant's land, creates such a joint ownership. Indeed, such a claim could not have been made, with any well-grounded hope of success. It is opposed to all the authorities, and especially to that on which the defendant chiefly relies. "Thus," it is said, "if a house overhang the land of a man, he may enter and throw down the part hanging over, but no more; for he can abate only that part which constitutes the nuisance;" 2 Roll. 144, l. 30; *Rex v. Pappineau*, 1 Str. 688; *Cope v. Marshall*, 1 Burr. 267; *Welch v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; 7 Serg. & Lowb. 205; Com. Dig., tit. Action on the case for a nuisance, D, 4; and in *Waterman v. Soper*, 1 Ld. Raym. 737, the case principally relied on, by the defendant's counsel, it is laid down: "That if A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of the tree. But if all the root grows in the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A."

The claim of joint ownership, then, rests on the fact that the tree extends its roots into the defendant's land, and derives a part of its nourishment from his soil. On this ground, the charge proceeded, in the court below; and on this, the case has been argued in this court. We are to inquire, then, whether this ground be tenable. The only cases relied upon, in support of the principle, are, the cases already cited from Lord Raymond, and an anonymous case from Rolle's reports: 2 Roll. 255. The principle is, indeed, laid down in several of our elementary treatises, 1 Swift Dig. 104; 3 Stark. Ev. 1457, n.; Bull. N. P. 84. But the only authority cited is the case from Lord Raymond. And it may well deserve consideration, whether that case is strictly applicable to the case at bar; and whether it carries the principle so far as is necessary to sustain the present defense. That case supposes the tree to be planted on the "extremest limit," that is, on the utmost point or verge of A.'s land. Is it not then fairly inferable from the statement of the case, that the tree, when grown, stood in the dividing line? And in the case cited from Rolle, the tree stood in the hedge, dividing the land of the plaintiff from that of the defendant. Is it the doctrine of these cases, that whenever a tree, growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the

lands of another, they therefore become tenants in common of the tree? We think not; and if it were, we can not assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principles to practice; and, in the next place, we think the weight of authorities is clearly the other way.

How, it may be asked, is the principle to be reduced to practice? And here, it should be remembered, that nothing depends on the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely on the inquiry, whether any portion of the roots extend into his land. It is this fact alone, which creates the tenancy in common. And how is the fact to be ascertained?

Again; if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriate all the products, on what principle is the account to be settled between the parties?

Again; suppose the line between adjoining proprietors to run through a forest or grove. Is a new rule of property to be introduced, in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing, indeed, on his own land, but near the line; and whether he can safely cut them, without subjecting himself to an action?

And again; on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth.

It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle. We are not prepared to adopt it, unless compelled to do so, by the controlling force of authority. The cases relied upon for its support, have been examined. We do not think them decisive. We will very briefly review those, which, in our opinion, establish a contrary doctrine.

In the case of *Masters v. Pollie*, 2 Roll. 141, it was adjudged,

that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. The authority of this case is recognized and approved, by Littledale, J., in the case of *Holder v. Coats*, 1 Moo. & M. 112; 22 Serg. & Lowb. 264. He says: "I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so."

The same doctrine is also laid down in *Millen v. Fandrye*, Poph. 161, 163; *Norris v. Baker*, 3 Bulst. 178. See also, 20 Vin. Abr. 417; 1 Chit. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that the plaintiff and defendant are not joint owners of the tree; and that the charge to the jury, in the court below, was, on this point, erroneous.

It is, however, contended, that although the charge on this point was wrong, there ought not to be a reversal, as upon another ground the defendant was clearly entitled to judgment in his favor.

It is urged, that land comprehends everything in a direct line above it; and therefore, where a tree is planted so near the line of another's close that the branches overhang the land, the adjoining proprietor may remove them. And in support of this position, a number of authorities are cited. The general doctrine is readily admitted; but it has no applicability to the case under consideration. The bill of exceptions finds, that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the jury proceeds on the ground that he has a right so to do. Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such, to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use: *Beardslee v. French*, 7 Conn. 125 [18 Am. Dec. 86]; *Welch v. Nash*, 8 East, 394; *Dyson v. Collick*, 5 Barn. & Ald. 600; S. C., 7 Serg. & Lowb. 205; 2 Phil. Ev. 138.

On the whole, we are of opinion, that there is manifest error in the judgment of the court below, and that it be reversed.

The other judges ultimately concurred in this opinion; WILLIAMS, C. J., having at first dissented, on the ground of a decision of the superior court in Hartford county, *Fortune v. Newson*, and the general understanding and practice in Connecticut among adjoining proprietors.

Judgment reversed.

CASES  
IN THE  
COURT OF ERRORS AND APPEALS  
OF  
DELAWARE.

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**TOWNSEND v. HOUSTON.**

[1 HARRINGTON, 532.]

**PAYMENT OF A SUBSTANTIAL PART OF THE PURCHASE MONEY** in the execution of a parol agreement for the sale of lands is such a part performance as will take the case out of the statute of frauds, and will warrant a specific performance.

**A CONTRACT RELATING TO LANDS PARTLY EXECUTED** by one of the parties may be proved by parol, and specific performance decreed, in order that one side may not take advantage of the other.

**THE COURT MUST BE ABLE TO ASCERTAIN THE TERMS** of an agreement partly performed, in order to warrant a specific performance.

**EQUITY DECIDES UPON EQUITABLE GROUNDS** IN CONTRADICTION to the positive enactments of the statute of frauds, and in case of part performance will admit parol testimony to prove a parol contract relative to land.

**THE ACT RELIED UPON AS PART PERFORMANCE** should be such as would not have been done independent of some agreement or contract relative to land.

**THE ACT MUST, TO A CERTAIN EXTENT, BE A JOINT ACT**, or such as clearly indicates a mutual assent.

**ENTERING INTO POSSESSION BY THE VENDEE** with the consent of the vendor, is a part performance which will entitle the vendee to prove the terms of the contract by parol.

**THE DISTINGUISHING PRINCIPLE** is that the part performance must be something done in the execution of the agreement, and not as preparatory or as inducement.

**THE RECEIPT OF THE PURCHASE MONEY BY THE VENDER**, proved by writing, is a part execution of a contract for the sale of land.

**BILL** in equity, for the specific performance of a parol agreement to sell land. The bill stated that the lands of Thomas Townsend, the defendant's intestate father, were appraised in the orphans' court, and stood for acceptance; that plaintiff and

defendant agreed that they should accept the same, and that the defendant should sell one half thereof for three thousand seven hundred and fifty dollars, to be paid in a half interest in a schooner and a scow, at the value of six hundred and twenty-five dollars, in the discharge of the debt of the decedent for two thousand one hundred and fifty-five dollars, due the Farmers' bank, and in the remaining sum of one thousand five hundred and forty-seven dollars and fifty cents, to the defendant on the execution of the deed. The plaintiff alleged the payment of eight hundred dollars and six hundred dollars, and the transfer of the scow, being part payment of two thousand and twenty-five dollars, and the tender of the residue. The defendant pleaded the statute of frauds, and admitted the receipt of the sums of eight hundred dollars and six hundred dollars alleged, but denied that it was in part performance of an agreement to sell the land; that there was no such agreement; he further admitted that the plaintiff made an indorsement to the Farmers' bank, but alleged that he was never called upon to pay the same; and denied the receipt of the vessel and scow.

These receipts were given in evidence.

"Received, March 10, 1832, of Robert Houston, eight hundred dollars, which is in part pay of the half of the mill property, etc., in Middleford, which I promise to deed when called on.

(Signed)

BARKLEY TOWNSEND."

"Received, April 17, 1832, of Robert Houston, six hundred dollars in part pay of the one half of the Middleford property, which I have sold to him—six hundred dollars.

(Signed)

BARKLEY TOWNSEND."

The plaintiff replied generally to the plea of "the act about contract and assumptions, and a special replication setting out the receipts as sufficient to take the case out of the act. This special replication was stricken out, and the plea overruled. On the general hearing the defendant was ordered to account for one half the rents and profits of the lands assigned to him by the orphans' court, with liberty to except. Whereupon this appeal was taken.

*Bayard and J. M. Clayton*, for the appellant: 1. The contract, if any, is within the statute of frauds; the receipts produced do not contain the terms of the agreement: *Sug. Vend.* 53; 2 *Prec. in Ch.*; *Seagoood v. Meale*, *Prec. in Ch.* 560; *Blagden v. Blagden*, 12 *Ves.* 466. The writings here offered do not specify the price, nor describe the land: 2 *Swans.* 257. A specific performance has

been decreed where one term of the agreement was wanting: 2 Hov. on Frauds, 8; 1 Ves. & Bea. 524; *Clows v. Higginson*, 13 Johns. 300. 2. Part performance is not proved such as will warrant a specific performance. Part payment is not a part performance, for the part has an ample remedy at law: Sug. Vend. 77, 82-87, 90; 2 Hov. on Frauds, 3, 4; 1 Madd. Ch. 379; 1 Sch. & Lef. 22, 33-40; 6 Ves. 32. 3. In any event relief can not be granted under this bill. The party must prove the contract as he states it: 2 Hov. on Frauds, 4, note 2, 6; 5 Ves. 457; 6 Id. 554; 1 Madd. Ch. 384, 385; 2 Sch. & Lef. 7; 2 Wheat. 341. The bill alleges that Houston and Townsend should join in the acceptance, and the proof is, that Townsend accepted and Houston became a surety.

*Frame*, for the appellee. That equity will enforce a specific performance of a contract part performed, is well settled: 2 Hov. on Frauds, 1, 2; 1 Fonbl. 181, 182, 185; 1 Madd. Ch. 377. Part performance consists of acts which themselves show the agreement; it does not, therefore, lie in words: 1 Fonbl. 181; Sug. Vend. 83, 86; 1 Madd. Ch. 377; 1 Swans. 181; 7 Ves. 346; 1 Binn. 218; Reev. Dom. Rel. 340, 399; Pow. on Con. 291; 1 Chit. Dig. 60. Payment, when evidenced by writing, as in this case, is a part performance: *Lacon v. Mertyns*, 3 Atk. 1; *Buckmaster v. Harrop*, 7 Ves. 346; Rob. on Fraud, 142, 143, 144. The relief extends to all cases where there has been an unequivocal act of part performance: Freem. 281. The writings in the present case plainly show for what purpose the money was paid: 1 Pow. on Con. 307; 2 Cai. Cas. 109; 1 Pet. C. C. 388; Rob. on Frauds, 153. To ascertain the terms of this agreement, this court will take all means within its power: Sug. 92, etc.; 1 Ves. sen. 221; 2 Ves. jun. 243; 1 Sch. & Lef. 1; Vin. Abr. 523, pl. 4, 38; 6 Ves. 470; Dig. 103. A substantial proof of the contract set out in the bill is sufficient.

JOHNS, jun., Chancellor (after stating the case). The decision of this case appears to me to depend on that of two questions: 1. Whether there has been a part performance. 2. If there has, then whether the terms of the parol contract as set forth in the bill are clearly proved. It is now settled, that equity does decide upon equitable grounds in contradiction to the positive enactment of the statute of frauds; and in cases of part performance, will admit parol testimony to prove the terms of a parol contract, relative to land: Hov., tit. Specific Performance, 1, 2. The ground of equitable



interposition is the prevention of fraud: *Vide Foxcraft v. Lister*, Colles Parl. Cas. 108; Jeremy Eq. Treatise, 437; 2 Atk. 100; 1 Bro. C. C. 417; 1 Swans. 181; 7 Ves. 341; 3 Id. 39, 40, and note; *Parkhurst v. Vancortland*, 14 Johns. Rep. on App. [7 Am. Dec. 427]. Whether payment of part of the purchase money is such a part performance as takes the case out of the statute, appears to be an unsettled point and the decisions are contradictory: 1 Madd. 379; Sug. Vend. 81-85. The early decisions upon the subject are, *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46; *Seagood v. Meale*, Prec. in Ch. 560; *Luke v. Morris*,<sup>1</sup> 2 Ch. Cas. 135; these are generally cited as authorities to the point that it will not, but I would remark with respect to them, that they are adverted to in subsequent decisions as cases in which only a small sum was paid as earnest; and in 3 Atk. 1; 3 Ves. 37; 4 Id. 720, it is held that part payment of the purchase money does take the case out of the statute upon the principle of part performance. These decisions have been objected to as extrajudicial by Sugden, and nothing more than *dicta*; he refers to one made by Lord Redesdale, as conclusive: 1 Sch. & Lef. 41. Upon looking into this case it appears to me, the contract was in writing, "the sum paid was in the agreement stated to be a deposit, and interest to be paid, if possession not delivered;" the plaintiff seeking a specific performance of this written contract, which was under seal, attempted to supply by parol proof one of the terms alleged to have been omitted. It is true in this case Lord Redesdale does take up the question whether part payment is part performance; and reasoning upon the case before him, and its circumstances, concludes therefrom, and also from the peculiar phraseology of the English statute of frauds, that part payment of purchase money does not take the case out of the statute of frauds; for he says, the great reason, as I think, why part payment does not take such agreements out of the statute is, that the statute has said that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods and were silent as to the case of lands, they meant that it should not bind in the case of lands. As this distinction does not exist in the act of assembly about contracts and assumptions, which is the act relied on by the defendant in this case, it may be questioned whether Lord Redesdale's opinion can have any influence, especially as his reason does not apply.

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1. *Leak v. Morris*.

So far as I have been able to trace the question in the American Decisions upon the point of part payment, they accord with decisions and *dicta* of Lords Hardwicke and Roslyn. In the case of *Wetmore v. White*, 2 Cai. Cas. in Error (New York), Thompson, J., in delivering the opinion of the court (p. 109), says expressly, payment of the consideration money had always been held as a part performance. Judge Reeve, under the title, "Powers of Chancery," in his treatise on Domestic Relations, has, after stating the conflicting decisions on this point, remarked in his peculiar manner, "that if it be no fraud to receive another's money on the footing of a parol agreement, and then to refuse the fulfillment of the agreement, then the cases in Prec. in Ch., Eq. Cas. Abr., and Sch. & Lef. are correct, if the governing principle of the interference of chancery was to prevent fraud; but if it be fraud so to do, then they are incorrect, and the cases in Vern., 3 Atk., and 4 Ves. are correct, which proceed on the ground that the prevention of fraud was the reason why they were supposed not to be within the statute. Justice Washington, in the case of *Thompson v. Tod*, 1 Pet. Cir. Ct. Rep. 388, says: "Although it should be admitted, that under all the circumstances of this case, payment of a part of the purchase money will amount to a part performance, still it should appear beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended."

This opinion of Washington, J., accords with the principles as laid down in Pow. on Con., and 1 Bac. Abr. 74, tit. Agreement. I will refer to what is said by Bacon upon the subject of part performance as it recognizes essential principles and states the rule of evidence with respect to the payment of purchase money. Under the title of Agreement, Bacon says: There are several cases, on which it has been held, that a parol agreement in part executed shall be performed in the whole; but as those cases are not exactly stated or well reported, it will be sufficient to mention what seems to be the sense of them, and what with any justness can be collected from them, that if an agreement be made concerning lands, though not in writing, and the party by whom it was made receives all or part of the money, equity will compel a specific performance of the whole agreement; because this is out of the statute, which designed to defeat such agreements only, no part whereof was carried into execution, and set up merely by parol; for that was the occasion of frauds and perjuries, that persons used to impose

verbal agreements upon others, and by such false oaths charge the parties in equity to perform such agreements though they had never been made, and therefore the mere parol proof of such agreements concerning lands can not be admitted in a court of equity; but where the price is paid, there it doth not stand upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and therefore there is the same reason that the plaintiff in equity should have the land for his money, as it is that he should deliver the goods where he has received the money; but the doubt in these cases is, what shall be a proof of the receipt of the money.

Thus far it seems certain, that if the defendant, in his answer, confessed the receipt of the money for that purpose in the bill, or if he denies the money, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he shall be obliged specifically to perform the whole agreement, because he hath carried part into execution; but if the defendant confesses the receipt of the money, but says that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff must prove the receipt of the money by the defendant for the purpose in the bill, by some written agreement (note b), for parol evidence as to the receipt of the money, seems to be as much excluded by the statute as parol evidence relating to the agreement. From the investigation of the several cases, I came to the conclusion, that there may be cases, in which payment of the whole or part of the purchase money will amount to performance of a parol contract concerning lands; and whenever the non-performance on the part of the vendor, after receiving the purchase money or a part thereof, would put the party into a situation that is a fraud upon him, unless the agreement is performed, the court, upon the principle of preventing fraud, should decree a specific performance; provided the terms of the agreement can be satisfactorily ascertained, that is, the agreement as set forth in the bill. The act relied on as part performance should be such as would not have been done independent of some contract or agreement relative to land; because as you are from the act performed to infer a contract, it must therefore be an act of that description, which will not admit any other inference. I would further remark, that the act should to a certain extent be a joint act, or such as clearly indicates mutual assent; thus entering into the

possession of land as owner and with the consent of the vendor, has uniformly been considered and admitted to be part performance, and being evidence *per se* of an agreement for and concerning the land, the party seeking specific performance, is permitted, by parol, to prove the terms. This act of the vendee, in entering upon the land and taking possession thereof as owner, with the assent of the vendor, is considered as in execution of an agreement, and therefore a part performance; but acts which are only preparatory, such as giving directions for conveyances, taking a view of the estate, or putting a deed into the hands of a solicitor to prepare a conveyance, are not considered part performance: *Clerk v. Wright*, 1 Atk. 12; 6 Bro. Parl. Cas. 45; 3 Bro. C. C. 400; 1 Madd. 381.

So likewise where there was a parol agreement for a compromise and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, such as surveying, etc., were not considered as acts of part performance: 6 Ves. 41. And where there was a parol agreement for the purchase of a lease, and that upon the plaintiff procuring a release of right from a stranger, the defendant would convey and the plaintiff procured the release for a valuable consideration, this was held not to be a part performance entitling the party to a specific performance: 2 Cox, 271. These cases and particularly the last clearly evince the principle, which is essential to constitute an act, a part performance; the thing done must be, as before stated, in execution of the contract, and not as preparatory or as inducement: See *Givens v. Calder*, 2 Desau. 190 [2 Am. Dec. 686]. Hence has arisen the difficulty with respect to the payment of money, not being such an act as of itself is conclusive, for it may have been made for a purpose different from that alleged, and if the party paying can by parol prove the fact of payment and the object, then it is apparent the door is open to perjury and fraud, and the statute would be rendered useless and its provisions defeated. This has no doubt given rise to the opinion that payment of money either in part by way of earnest or in full for the purchase is not a part performance; if the fact is to be established by parol, then I should consider the opinion to be well founded, but if the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money, and this appears either by the defendant in his answer confessing the receipt of the money for that purpose as charged in the bill, or if denied it be proved upon him by writing, as by letter

under his hand or other written evidence; or if the defendant confesses the receipt of the money, but says he borrowed it from plaintiff and had it not in execution of the agreement, then if the plaintiff prove the receipt of the money by the defendant for the purpose in the bill by some written agreement; in all such cases and upon every principle it seems to me such a fact thus appearing would be conclusive evidence of an existing agreement of which it was part performance, and which the defendant having carried part into execution should be compelled specifically to perform the whole.

In the case now under consideration, the complainant in his bill has charged the payments made on account of the purchase money and in execution of the agreement set forth. The defendant in his answer admits the receipt of the money, as an advancement, pending the treaty for sale, but denies that said advancements were a part performance of an agreement to sell and convey the said real estate or any part thereof to complainant, and also admits the two receipts. As the answer here admits the receipt of the money and denies that it was in part performance, we must recur to the receipts of tenth March, 1832, and April 17, 1832, which are admitted by the defendant and proved by the witnesses to be signed by him; these receipts unequivocally establish the fact of part payment to the amount of one thousand four hundred dollars, nearly one half the purchase money as set forth by the complainant in his bill; the defendant has also admitted the proceedings in the orphans' court, relative to the acceptance, and has not denied the matter stated by the complainant as to the inducement why he entered as surety in the recognizance. The equity of the complainant as thus presented is strong, and a case could not occur more in accordance with the rule as laid down by Bacon than that which appears from the two receipts. The defendant by the first receipt, dated March 10, 1832, has not only acknowledged the receipt of eight hundred dollars, but also says, "which is in part pay of the half of the mill-property in Middleford which I promise to deed when called on." The proceedings in the orphans' court of the same date show the property and the acceptance by the defendant fixes the quantity; thus the subject-matter of the parol contract and to which the receipts refer by name, as the mill property in Middleford, is ascertained; a moiety of which, the defendant by said receipt declared he had sold complainant; and by the acceptance, it is proved to be two thirds of the residue of the Middleford property; which defendant accepted at the

valuation of which a moiety or half part be sold to the complainant. This is a question which, as it relates to the terms of the contract, will be hereafter considered, and properly belongs to the second question, to which I will now advert; and, under the circumstances of the case, being of opinion that the payments on account of the purchase-money made and proved as aforesaid are such acts as amount to part performance, I will now take up the second question, viz., whether, from the testimony in the case, the terms of the agreement set forth in the bill are clearly proved.

It being the settled rule of the court of chancery that where a contract relating to an interest in lands has been executed by one party, or carried partly into execution, it may be proved by parol evidence and specific performance decreed, in order that one side may not take advantage of the statute, to be guilty of fraud: 1 Ves. 221, 297; 2 Johns. 221, 573, 587; 1 Serg. & R. 80; 5 Day, 16; *Parkhurst v. Van Cortland*, 14 Johns. Rep. on App. 15 [7 Am. Dec. 427]. And from the circumstances of this case, as I was of opinion that the part payment of the purchase money is a part performance of the contract set forth in the bill, the next consideration was whether that contract was made out by clear and satisfactory proof. Upon this subject Sugden, 86, remarks: It may happen that although an agreement be in part performed, yet the court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If however the terms be made out satisfactorily to the court, contrariety of evidence is not material (1 Ves. 221), and the court will use its utmost endeavors to get at the terms of the agreement: 2 Ves. 243; 2 Sch. & Lef. 1; 5 Vin. Abr., p. 523, pl. 40; Id. p. 522, pl. 38; 6 Ves. jun. 470; 3 Bro. Ch. 139; 1 Sch. & Lef. 22. In 6 Ves. jun. 470, *Boardman v. Mostyn*, Lord Eldon says: Perhaps if it was, *res integra*, the soundest rule would be, that if the party leaves it so uncertain, the agreement is not taken out of the statute sufficiently to be enforced: but in all the cases in equity, the court has at least endeavored to collect, if they could, what were the terms the parties have referred to. Sugden on Vendors, 89, after stating the case, lately decided by Lord Manners, and remarking that great reluctance had been manifested in carrying parol agreements into execution on the ground of part performance, where the terms do not distinctly appear, observes that notwithstanding the case decided by Lord Manners, there appears to be abundant authority to prove, that the mere circumstance of the terms not

appearing, or being controverted by the parties, will not of itself, deter the court from taking the best measures to ascertain the real terms. And Sugden further remarks, that it can rarely happen that an agreement can not be distinctly proved where the estate is absolutely sold: most of the cases on this head have arisen on leases, where the covenants, etc., are left open to future consideration. If from the testimony it is difficult to ascertain the terms of the agreement, the court, to remove all doubts, direct an issue. Hence in the case now before the court, if I am correct in the opinion I have expressed on the first point as to part performance, then it would be incumbent on the court to ascertain the terms of the contract, or if this could not be done, to direct an issue as to such facts as may not be clearly proved or established. The only fact about which there can be a doubt in the present case, is the price.

The subject-matter of the contract and the quantity thereof sold, and for which the defendant promised to give a deed on demand, I consider settled beyond all controversy, by the receipts signed by defendant and bearing date March 10, 1832, and April 17, 1832; and their operation and extent fully and unequivocally ascertained when taken in connection with the proceedings relative to the acceptance of said real property by defendant, in the orphans' court of Sussex county, and the testimony of Boyce and Elligood; the defendant having by the acceptance acquired a title to two thirds of the real estate of his father, Thomas Townsend, deceased, described as the mill property in Middleford; and by the receipts dated March 10 and April 17, 1832, defendant acknowledges to have received the sums mentioned, in the first receipt in part pay of the half of the mill property in Middleford, which he promised to deed when called on; by the second receipt he says in part pay of the one half of the Middleford property which I have sold him. Thus much appearing to the court by these receipts, which are proved in the cause and not even denied, except evasively, as to their import, in the answer, I shall proceed to the inquiry whether the testimony satisfactorily establishes what was the consideration agreed upon.

The complainant in his bill sets forth the consideration and alleges the same to be three thousand seven hundred and fifty dollars, and then proceeds to state the manner in which it was agreed he was to pay the same to defendant. The defendant, in his answer, denies that any sum ever had been in fact agreed upon. The answer thus positively denying the fact, unless the

same is established, either by the testimony of two witnesses or of one corroborated by circumstances, the denial in the answer must be conclusive. As this is one of the essential terms of an agreement, and necessary to be ascertained, I will advert to the testimony. The first witness on the part of the complainant (the defendant not having taken any testimony) is that of Captain Boyce, who in his deposition states, "that the defendant in the month of April or May, 1832, informed him he had sold half of the Middleford mills and property to complainant and purchased the schooner Tanner and scow from him for six hundred and twenty-five dollars; price of real property not stated; that he could have got more for said property than he had agreed to let Robert Houston (complainant) have it for." Now it does appear that although no price was stated, by the witness, yet his testimony proves two facts, viz., that the defendant had sold half of said property to the complainant, and for a consideration agreed upon between the plaintiff and defendant, because the defendant in stating to the witness that he had sold, had he said nothing more, would have afforded strong ground of presumption; but when he goes on to state that he could have got more, for said property, than he had agreed to let Robert Houston have it for, he thereby unequivocally refers to a fixed price, settled and agreed upon between the parties; otherwise how could he with any propriety say, he could have got more for said property?

The admission of the defendant as proved by this witness is therefore at variance with that part of his answer which denies that any price or sum or terms was agreed upon or fixed between complainant and defendant for the purchase of the said real estate by the complainant; hence, unless the testimony of Capt. Boyce is either sustained by another witness or corroborating circumstances, it can not prevail, against the positive denial of the defendant which is made under oath. But it does further appear from the deposition of J. A. Elligood, that some time in the spring of 1833, at the time when complainant tendered the alleged balance of the purchase money, that the defendant in presence of Elligood, in replying to what complainant stated to be the contract or agreement, admitted, "that he had heretofore agreed to convey said property to him, for the amount mentioned, but that it would be unjust that he should convey for that sum, being one half of the valuation money. From the testimony of these two witnesses, both unimpeached and not controverted, except by the denial in the answer, it does ap-



pear, that the parties had agreed upon the price or sum constituting the consideration, and from Elligood's the sum is ascertained to be half of the valuation and thus rendered certain, because *id certum est quod certum reddi potest*; and by referring to the record of the orphans' court which is in evidence in this cause, the one half of the valuation appears to be the sum of three thousand seven hundred and fifty dollars, as alleged in complainant's bill. In considering the testimony in relation to this fact, of the sum or price not having been fixed or agreed upon by the parties, the deposition of Noonan in connection with the answer at first view appeared to present some uncertainty whether the sum fixed or agreed upon was the half of the valuation, or half what the property cost defendant, and whether under the term half what the property cost, could be included the half of other expenses relative to the procuring the act of assembly, etc., they being properly a charge against the fund generally.

But the deposition of this witness has relation to declarations of Townsend as to what he intended to do, and not like the others, of what he had done. The subsequent information of Townsend's, that there was a misunderstanding between him and Houston, does not disclose the cause, only that it was about the purchase of the Middleford property. From the declarations of Houston to Noonan, it does appear that it related to the extra expenses which it appears were never adjusted although he seems to have been willing to pay his fair proportion. From the declarations and the occasion when they were made, both before Noonan and Elligood, I was induced to believe this difficulty about extra expenses originated after the defendant had refused to perform the agreement. I was led to this opinion by the import of defendant's letter, addressed to complainant, dated April 26, 1832. In this letter the defendant attributes the interruption of the business to some unpleasant circumstance, which he was to communicate to the complainant when he should see him, and evidently attributes the non-compliance on his part to the interposition of some people, "who he says made themselves very busy and who knew well when to stop it," etc. If the real difficulty had been a misunderstanding about the extra expense, would it not have been disclosed in this letter of the twenty-sixth of April? Why intimate that he was compelled to relate a circumstance that was very disagreeable to him? Surely if the other had been the difficulty, it would have been stated with propriety, without occasioning any unpleasant

feeling such as the letter implies, nor could such a matter be in any way referred to the interposition of other people. This letter of the twenty-sixth of April, written a few days after Houston had paid the defendant six hundred dollars, evidently discloses that the writer was by no means satisfied with the course he was then adopting. He had, by the money and credit of the complainant, after discharging the debts against his deceased father's estate, been enabled to accept the two thirds thereof at the valuation reduced more than one half by the amount of incumbrances and the debts paid off, and in the course of the proceeding, as appears from the records of the orphans' court, had the benefit of the complainant's credit as one of his sureties in the recognizance—a liability yet subsisting. From these circumstances appearing in the cause, it is evident the defendant availed himself of the full benefit of the agreement so far as the same had been performed by Houston, and did not make known his determination not to comply with the same on his part until he had obtained all the advantage he expected to derive from it.

Upon the ground therefore that under the circumstances of this case it would be a fraud upon the complainant, if a specific performance was refused, I was of opinion the complainant was entitled to relief, but before the same could be granted it was necessary to direct an account of the rents and profits of the one half of the two thirds of the real estate for which the defendant, by receipt dated March 10, 1832, promised to give to complainant a deed on demand—and as equity considers as done that which is agreed to be done, I regarded the right of the complainant to the one half of the two thirds of the said real estate as a perfect and subsisting title in equity from the date of the aforesaid receipt; and that it carried with it the right to the rents and profits and entitled the defendant from that time to the balance of the purchase money with interest, subject to deductions for such payments as might be clearly proved to have been made and which, when the rents and profits shall be accounted for under an interlocutory order, will be adjusted, and the balance due on account of the purchase money being thus ascertained, then the court will be able to make a final decree in the cause.

The court affirmed the interlocutory decree of the chancellor, with costs, adopting the general views presented by him in explanation of his decree.

Decree affirmed.

PAYMENT IS NOT A PART PERFORMANCE.—The principal case is one of a few early cases, recognizing the sufficiency of the substantial payment of the purchase money, to take a case out of the statute of frauds, and warrant the decree of a specific execution of the contract. Mr. Pomeroy, in sec. 112 of his *Specific Performance of Contracts*, gathers the authorities upon this question. It is easy to distinguish from that array that the doctrine of *Townsend v. Houston* is not now the law in the majority of the states: "Payment of the purchase price, either in whole or in part, is not an act of part performance \* \* \* and does not take a verbal contract out from the operation of the statute: *Clinan v. Cooke*, 1 Sch. & Lef. 40; *O'Herlihy v. Hedges*, Id. 123; *Hughes v. Morris*, 2 De G. M. & G., 356; *Leak v. Morrice*, 2 Ch. Cas. 135; *Alsopp v. Patten*, 1 Vern. 472; *Lord Pengall v. Ross*, 2 Eq. Cas. Abr., p. 46, pl. 12; *Seagood v. Meale*, Prec. Ch. 560; *Buckmaster v. Harrop*, 7 Ves. 341; *Coles v. Trecothick*, 9 Id. 234; *Frame v. Dawson*, 14 Id. 388; *Ham v. Goodrich*, 33 N. H. 32, 39; *Kidder v. Barr*, 35 Id. 235; *Underhill v. Allen*, 18 Ark. 466; *Thompson v. Gould*, 20 Pick. 134; *Glass v. Hulburt*, 102 Mass. 24; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Cole v. Potts*, 2 Stockt. 67; *Allen's estate*, 1 Watts & S. 383, 389; *McKee v. Phillips*, 9 Watts, 85; *Parker v. Wells*, 6 Whart. 153, 161; *Gangwer v. Fry*, 17 Pa. St. 491; *Rankin v. Simpson*, 7 Harris, 471; *Jackson v. Cutright*, 5 Munf. 308; *Hyde v. Cooper*, 13 S. C. Eq. 250; *Anderson v. Chick*, Bail. Eq. 118; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Givens v. Calder*, 2 Desau. Ch. 174; *Smith v. Smith*, 1 Rich. Eq. 130, 132, 135; *Finucane v. Kearney*, 1 Free. Ch. 65, 68; *Hood v. Bowman*, Id. 290, 294; *Black v. Black*, 15 Ga. 445; *Mialli v. Lassabe*, 4 Ala. 712; *Hart v. McClellan*, 41 Id. 251; *Garner v. Stubblefield*, 5 Tex. 561; *Wood v. Jones*, 35 Tex. 64; *Wilber v. Paine*, 1 Hamm. (Ohio), 252; *Sites v. Keller*, 6 Id. 528; *Letcher v. Cosby*, 2 A. K. Marsh. 106; *Johnston v. Glancy*, 4 Blackf. 94; *Parke v. Leewright*, 20 Mo. 85; *Purcell v. Miner*, 4 Wall. 513; *Thompson v. Pot*, Pet. C. C. 380; *Cronk v. Trumble*, 66 Ill. 428; *Wood v. Jones*, 35 Tex. 64; *Lanz v. McLaughlin*, 14 Minn. 72; *Cuppy v. Hizon*, 29 Ind. 522.

"The statute of frauds of Iowa, however, in express terms, declares that the acceptance of the purchase price, or a part thereof, by a vendor of land, shall make a verbal contract of sale binding; shall, in effect, be equivalent to a written memorandum: *Fairbrother v. Shaw*, 4 Iowa, 570. In the earliest case it was held, that the payment of a considerable portion of the purchase price would take a verbal contract for the sale of land out from the operation of the statute, while the payment of a small portion would not have that effect: *Lacon v. Mertins*, 3 Atk. 4, per Lord Hardwicke, who held generally, that part payment was a good part performance: *Child v. Comker*, 3 Sw. 423, n.; *Owen v. Davies*, 1 Ves. sen. 82; *Hales v. Van Bercham*, 2 Vern. 618; *Skett v. Whitmore*, Free. Ch. 281; *Main v. Melbourne*, 4 Ves. 720, 724, per Lord Roslyn, who held as stated in the text; *Wetmore v. White*, 2 Car. Cas. 87, 109; *Townsend v. Houston*, 1 Harr. 532, 541; *Jones v. Peterman*, 3 Serg. & R. 543; *Frieze v. Glenn*, 2 Md. Ch. 361; *Harwood v. Jones*, 10 Gill & J. 404. But this distinction was long ago rejected as being based upon no sound principles." And so also Waterman on *Specific Perf.*, secs. 268, 269.

The principal case may be reconciled with the weight of authority, by considering it as one in which the contract did not rest entirely in parol, the receipts being such memoranda of the agreement as would enable the court to ascertain the terms of the contract. In fact, the chancellor says, that if the payment of the money were to be established by parol, he should consider well founded the opinion, that payment is not a part performance.

The generally prevailing doctrine is asserted in *Johnston v. Glancy*, post.

## ROACH v. MARTIN'S LESSEE.

[1 HARRINGTON, 548.]

**A DEVISE TO ONE AND HIS HEIRS WITH A REMAINDER LIMITED OVER**, if the devisee dies without issue or heirs of the body, is a fee tail.

**THE WORD "HEIR" OR "HEIRS" IS NOMEN COLLECTIVUM**, not a word of purchase, and carries the land not only to the immediate heir, but to all those who descend from that devisee.

**A DEVISE TO ONE AND HER HEIRS FOREVER**, "except she should die without an heir born of her own body," then to B., creates an estate tail with a remainder over.

**IF A DEVISE CAN TAKE EFFECT AS A REMAINDER**, it shall never be construed an executory devise.

**PERSONAL PROPERTY BEQUEATHED** to one and the heirs of his body, passes to the person absolutely, otherwise in the case of realty.

**DECREE OF THE ORPHANS' COURT** as to every point necessary to be decided upon, is conclusive.

**THE JUDGMENT OF A COURT OF COMPETENT JURISDICTION**, but proceeding erroneously, is valid until reversed.

**A JUDGMENT, SENTENCE, OR DECREE OF AN ORPHANS' COURT CAN NOT BE IMPEACHED** on the ground that the will was forged, or that the testator was *non compos mentis*, or that another was executor.

**AN ORDER DIRECTING THE SALE OF REAL ESTATE** can not be impeached in an action of ejectment brought by the purchaser at the sale.

**RECORD OF A DEED NOT RECORDED WITHIN A YEAR AFTER ITS EXECUTION** is admissible under the former act of assembly of Delaware.

**EJECTMENT.** The plaintiff claimed under the will of Mary Fergus, containing the following clause: "Fourthly. I give and bequeath unto my beloved daughter, Eliza Fergus, the remainder part of all my real and personal estate to her and her heirs forever, except she should die without an heir born of her own body; then my will and desire is, that all the last above real and personal estate goes to James Martin, him and his heirs forever." Mary Fergus derived title as purchaser at a sale under a decree of the orphans' court. The property was in Hannah Heavilo in 1788, who by will devised the same to her three sons, John, Edward, and Roderick, appointing John and Roderick her executors. The bond was made out in their names as principals, with one James Elliott as surety, but was not executed by Roderick, who has not been heard of for many years. John Heavilo dying, his executor, Benjamin Johnson, acted as executor of Hannah Heavilo, applied to the orphans' court for an order to sell the lands of her estate to pay her debts, obtained such order, and sold the lands to Mary Fergus.

*Bayard and Clayton*, for the defendants below, the appellants in this court, contended that the judgment was erroneous: 1.

In permitting to be read in evidence the proceedings of the orphans' court for the sale of the land of Hannah Heavilo, on the petition of Benjamin Johnson; 2. In admitting as evidence the record of the deed from Benjamin Johnson to Mary Fergus, it not having been recorded within one year from its execution; 3. In construing the devise to Eliza Fergus, as an estate tail with a remainder over.

*Frame, contra.*

By Court, BLACK, J. It is a rule of law now well established, that a devise to a person and his heirs, with a remainder limited over, if the devisee dies without issue or heirs of the body, is a fee reduced or narrowed to an estate tail, and that the devise over is (when such words are used) to take effect after an indefinite failure of issue, and is void by way of executory devise, as being too remote. Although the immediate devise imports a fee (the word heirs being introduced), it is restricted or controlled by the words subsequently used in the will manifesting the design of the testator to limit the operation of the word "heirs" to those of the body, and to give to the devisee an estate tail instead of a fee. This rule is not denied in the argument on the present occasion, and will be found to be sustained by the subjoined authorities: 6 Cru. 202; 5 T. R. 335; 7 Id. 276; 9 East, 382; 12 Id. 254; 4 Mau. & Sel. 62; 1 Com. L. 379; 5 Id. 373; 4 Kent Com. 200, 274, 276.

Did Eliza Fergus take, in the lands devised by the fourth clause of the will, an estate in fee, with a limitation over, which would be good by way of executory devise, to James Martin according to the settled principles of law; or did she take an estate tail, with a remainder over to James Martin, contingent on the event of her issue or heirs failing?

It is admitted on the part of the counsel of the plaintiff in error, that if the words "except she should die without an heir born of her own body," import an indefinite failure of heirs of the body of Eliza Fergus, and not a failure of heirs at the period of her decease, that then Eliza took an estate tail. But if, as they insist, the limitation over to James Martin was to take effect only on the event of Eliza Fergus dying without having had an heir born of her own body, or without having an heir born of her body, living at her death, that then the contingency on which Martin was to take was determined at the death of Eliza, and that the limitation to him would in that case be sustained as a valid executory devise, and Eliza held to have an estate in fee in those lands.

The term "heir" has assigned to it by judicial determinations its appropriate, peculiar, and technical import and meaning, and that import and meaning it is to receive unless there is something in the will clearly excepting it from this general rule, and showing that when used it was designed that this technical import should not be applied to it. In its legal import or signification it is not a word of purchase, nor a *designatio personæ*, but is *nomen collectivum*, and used as a word of limitation, and will carry the land devised not only to the immediate heir or issue, but to all those who descend from that devisee. It is immaterial whether the term "heir" or "heirs" be used, as the law has assigned to each of these the same import, and they each embrace the same class—all the lineal descendants of the original stock or root: Cro. Jac. 145; Cro. Eliz. 313; 2 Vern. 449; 5 T. R. 335; Har. & But. notes, p. 9, note 45. In *Burley's case*, reported in 1 Vent. 230,<sup>1</sup> 4 Bac. Abr. 260, there was a devise to A. for life, with remainder to the next heir male, and for default of such heir male, the remainder over, which was adjudged to be an estate tail, on the ground that the word "heir" was *nomen collectivum*, and carried the estate not only to the immediate heir or issue of A., but to all those who descended from him.

In *Whiting v. Wilkins*, 1 Bulst. 219, which was a devise to one forever, and after his decease, to his heir male forever, it was held, that "heir male" and "heirs male" are all one and the same, because "heir" was *nomen collectivum*, and that the devisee took an estate in tail male. In the case of *Hale's Lessee v. Vandegrift*, reported in 3 Binn. 374, a devise to A. and his lawful begotten "heir" forever, was adjudged to be an estate tail, the term "heir" being *nomen collectivum*. In the case of *Osborne v. Shrieve et al.*, 3 Mason, 391 (Cox Dig. 254), a devise to A. and his heir male, and to his heirs and assigns forever, but if A. should depart this life leaving no male heir lawfully begotten of his body, then to B. in fee, was held an estate in tail male in A., with a remainder over to B. As *nomen collectivum* the term "heir," therefore, in its technical import, is a word of limitation and not a word of purchase, or *discriptio personæ*. In this latter sense it is sometimes used when the manifest intention of the testator requires that it should be so used, but only when words of limitation are superadded to the term "heir," showing that the testator intended the "heir" to be the root of a new inheritance or the stock of a new descent.

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1. No such case in *Ventria*.

The term "heir" thus used describes the person from whom the inheritors of the land are to issue, and such "heir" takes not by descent from his parent, but by purchase and by direct devise under the will. He is the root or stock of the inheritance and descent, and the parent is not the root or stock from which the descendants or heirs are to issue. To effect this change of the technical import of the term "heir" there must, as we have said, be superadded to it words showing the intent of the testator, that this "heir" was to be the root of inheritance, as in *Archer's case*, 1 Co. 66, cited by the counsel for the plaintiff in error, where the limitation was to A. for life, and to the next heir male, and to the heirs male of the body of such next heir male. By superadding the words "to the heirs male of the body of such next heir male," the testator showed that he designed the "heir" before mentioned to be the root from which the heirs were to issue to whom the land should go. So also in the case of *Clerk v. Day*, in Cro. Eliz. 313, which was a devise to a daughter for life, and if she have heirs lawfully begotten, then the daughter's heir should have the land after the daughter's death, "and the heir of such heir." These latter words point to the daughter's "heir," as the root or stock; makes that term a *designatio personæ*, and that heir to take by purchase under the will and not by descent from its mother. So also in the case of *Luddington v. Kime*, 1 Ld. Raym. 203, 1 Salk. 224, where lands were devised to Evers Armyn for life, and in case he should have any issue male, then to such issue male and his heirs forever. Issue in this case, in order that the intention of the testator might take effect, had not its technical import (a collective one, signifying all the descendants), but it was held as denoting a particular person from whom the heirs or issue were to spring, and was taken as a word of purchase. Cases of a like complexion may be found in 1 Vent. 230; 1 Str. 12; Cro. Eliz. 453; 4 Kent Com. 220; 1 Fearn on Rem. 227, 234, 242, 279, 283; Pow. on Dev. 360.

In all these cases the first devisee took an estate for life and not one of inheritance, and we are not aware of any case in the books, where the first devise was in fee, that the technical import of the term heir or issue, has been held as a word of purchase, even where words like those referred to have been superadded. We can not, therefore, under an inspection of this will, hold the term heir to be a description of the person who was to take, or a word of purchase, as urged by one of the counsel for the plaintiff in error. There are no words superadded pointing

to this "heir" as the root of inheritable blood, or giving her the character of a taker by purchase; on the contrary, to the parent of this heir was given an estate of inheritance "except she died without an heir born of her own body." If she died leaving "an heir born of her own body," her estate of inheritance was not defeated but remained in her, and at her decease passed by descent to such heir and not by purchase.

The stress of the argument for the plaintiff in error, however, was on the words "except she should die without an heir born of her own body," which are used in the devise to the daughter, Eliza Fergus, in the fourth clause. They contend that by the peculiar language used--born of her own body--the testatrix intended to use the term heir not in its technical sense as a collective term embracing all descendants, but in a personal or individual or restricted sense, and that the term "heir" was to be confined to and embrace only the individual designated, and not the descendants of that heir--in other words, that heir was to be construed as if the term "child" had been used.

The words heir of the body; heir lawfully begotten of his body: 3 Mason, 391; 1 Fearn, 242; heirs of them on their bodies lawfully: 8 T. R. 211, have all been held to mean one and the same thing; to be begotten: 4 T. R. 605; if both die without issue of their own bodies; describe the class, and not the person; to embrace all heirs or all issue, and all descendants. Do the words "an heir born of her own body" more particularly designate a child or an immediate descendant of the body, than do the words we have referred to, "heir lawfully begotten of the body;" or "heir on their bodies lawfully begotten" or "issue of their own bodies;" and yet these words have been held as embracing all the lineal descendants--all heirs or issue proceeding from the body how remote soever the descent may be.

The heir or issue of the body of an individual, can only be the heir or issue of that individual's own body--the heir or issue born of that individual's own body, that is, issuing from that body. The term heir begotten on the body: 4 T. R. 605, is not confined to the immediate or first descendant of the body, but embraces all proceeding from that descendant; and we can see no reason why the term "the heir born of her own body," can on any principle be more restricted or confined. The language in each case is equally plain and strong and the same legal interpretation of these words must prevail. In the case of *Doe on the demise of Gregory v. Whickelo*, 8 T. R. 211, where the limitation over was in the event of the son and



daughter dying without issue of their own bodies, the term own (which is also used in this will), was not considered as having any peculiar influence, or as having any other import than the words "their bodies" would have had, or as changing the settled legal and technical import of the expression "dying without issue." The term "heir" is not less technical or comprehensive than the word issue, but the contrary, and yields its legal import with greater difficulty than the word issue: 4 T. R. 299. When the words first, next, or eldest have been prefixed to the term "heir" in a will, they have not been held as sufficient to show an intent in the testator to control its technical import, as will appear from the cases collected by Mr. Powell in his treatise on devises, pp. 361, 362. We can see nothing in this will which can induce us to think it was the design of this testatrix in using the word heir, to use it in any other than its settled technical sense; that is as embracing all the descendants from the body of her daughter, Eliza Fergus, and not to confine it to the child of Eliza to the exclusion of a grandchild, and to allow the estate to go over to Martin, while Eliza left a grandchild living, although she might not have left to survive her a child or an immediate "heir born of her own body."

In our judgment, then, the words used in this will, "except she should die without an heir born of her own body," are to receive the same construction as is or would be given to the words, "except she should die without heirs or issue of her body." Such words have by judicial decisions which this court must respect, received a certain fixed legal import, which should not be disturbed—they import an indefinite failure of issue—a failure of descendants of the first taker without reference to any particular time or event, and that a devise over after such an indefinite failure of issue can not take effect by way of executory devise, but is void, is a rule too well established and too familiar to the profession to render it necessary to refer to adjudged cases to sustain it.

If we should hold that Eliza Fergus took a fee in the lands devised in the fourth clause, we should render null and forever inoperative the limitation over to James Martin, as it could not take effect as an executory devise, being too remote. In this point therefore we should defeat the intention of the testatrix, who intended that Martin should have this portion of her real estate whenever there was a failure of issue from the daughter. Further: under such a construction James Martin would

take nothing by this limitation, if Eliza died leaving a child, and that child had died without issue in an hour after its mother; and yet this is the very state of things, in which it was manifestly the design of the testatrix that this land should pass to Martin, that is, when all the issue of the daughter was extinct.

It was urged by one of the counsel for the plaintiff in error, that this clause gave to Eliza a fee with an executory devise over to Martin which was to be determined during the life of Eliza Fergus, or at the moment of her death, and was therefore good; that if she had a child born of her body, the limitation over was defeated even if such child or its issue did not survive her. This surely was not the intention of the maker of this will: she intended that Martin should have this land if Eliza died leaving no issue, and not that it should escheat to the state, which, from Eliza's illegitimacy, would have been the result had she died intestate, as she could have no other than lineal heirs. So to construe this will would render it necessary most materially to change its language, and to introduce into it words which the testatrix has not placed there—in fact, to make a will for her. The will is not, as the argument of the counsel would render it necessary that it should be, except my daughter should die without ever having had an heir born of her own body; then over, etc.: but it is except “she should die without an heir born of her own body;” that is, without leaving an heir born of her body; then over to J. Martin.

According to another view taken by the counsel of the plaintiff in error of this clause of the will, the daughter was to have a fee in this part of the estate if she died leaving an immediate descendant of her own body, that is, leaving a child. That the executory devise over was to be decided by this event, which would make it a good executory devise within the rules of law, as it would either take effect or be defeated at the moment of the death of the daughter who was then in being; that if Eliza died without leaving an immediate descendant of her own body, that is, without leaving a child to survive her, the lands on her decease passed under the limitation to James Martin as a valid executory devise. If this construction should obtain, this result would in a certain state of things arise, that Martin would take this land, notwithstanding a granddaughter of Eliza Fergus was in being, which unquestionably could never have been the intention of the testatrix: if Eliza had had a child, and that child should have had a child and died in the life-time of Eliza, leaving this child to survive her, such child not being the im-

mediate descendant or child of Eliza, but her grandchild, would not on her decease be held according to the argument to be an heir born of Eliza's own body, and there being no such heir living at her death, the executory devise to Martin would take effect, and the grandchild be excluded from all benefit or participation in this part of the estate. No one can for a moment suppose that such an intention existed in the mind of this testatrix when making this will.

It would appear from an examination of the different parts of this will to have been the design of Mary Fergus to make some difference in the nature of the estates given to her daughter, in the two parcels of land devised to her. The storehouse, lot, and granary, are devised to James Martin for ten years, and then given to the daughter in fee, without any limitation; while the lands devised by the fourth clause of the will are given to her and her heirs with a limitation over, of those lands only, to Martin in the event of her dying without an heir born of her body. This limitation does not extend to the storehouse, lot, and granary, nor is there in the will anything relating to it restricting it to an estate tail. Had no difference in the nature of the estates given to the daughter been intended by the testatrix, it would have been natural to have extended this limitation in favor of her friend to all the lands devised the daughter.

The intention of the maker of this will seems to be plain and free from all reasonable doubt or question, and it is the duty of this court to carry that intention into execution, unless it conflicts with some settled rule of law. Her design manifestly was to give to her friend, James Martin, the storehouse, lot, and granary for ten years, and that it should then pass to her daughter in fee simple; and to give the remainder of her real estate to her daughter in tail to be enjoyed by that daughter and the issue of her body, and that if at any time there was a failure of such issue, that such remainder of her real estate should then vest in James Martin in fee. It is an established rule of law that if a devise can take effect as a remainder it shall never be construed an executory devise. Effect can be given to this devise to Martin, according to the express design of the testatrix, if we construe this an estate tail in Eliza Fergus with a remainder limited over to him on the contingency of her dying without issue—the limitation would take effect if the issue failed, and if the issue did not fail it was not intended by the testatrix that it should take effect—on the other hand the de-

visé to Martin will be forever defeated, if we hold that Eliza Fergus took an estate in fee; as the limitation over, being an indefinite failure of issue, could never take effect as an executory devise. To construe this a fee tail in Eliza Fergus gives full operation to all the intentions of the testatrix in favor of the several objects of her good will and in the order she designed; that is, first to her daughter, next to the issue of that daughter, and then to her friend James Martin: any other interpretation would or might defeat one or other of those objects, and thus frustrate one of the testatrix's designs. This construction instead of conflicting with settled principles is in perfect conformity with those which have been established by a series of adjudications, namely: that a devise in fee with a remainder over if the devisee dies without issue or without an heir, or without heirs of the body, is a fee cut down to an estate tail: 5 T. R. 335; 7 Id. 276; 9 East, 382; 12 Id. 254; 4 Mau. & Sel. 62; 1 Com. L. 379; 5 Id. 373; 4 Kent Com. 200, 274, 276.

It may be proper to notice an argument urged by the counsel for the plaintiff in error to this effect—that the testatrix by the fourth clause of her will devised to her daughter all the remainder of her estate, both real and personal, and limited over to Martin that real and personal property if her daughter died without an heir born of her own body. That under this clause the daughter unquestionably took the personal estate absolutely, and that in no event could Martin have any benefit by this limitation in relation to it, as words in a will which when used in reference to lands give an estate tail therein, will when used in relation to personal property give an absolute estate in that species of property: that it was the intention of the testatrix to limit over to Martin both the real and personal estate on the same contingency: that this intention is defeated if the words used are held to give an estate tail, but will be sustained as to both kinds of property, if they are held to give an estate in fee with an executory devise over to James Martin. We do not feel the force of this argument, or consider that it can be of any weight in the present case. It may have been and probably was the design of the testatrix to limit over to Martin both the real and personal estate, if her daughter died without issue, and this intention should prevail unless it conflicts with some fixed rule of law. If it does so conflict, the rule must prevail and the intention yield to it. The intention in this case then, as it is urged, was to give an estate in fee in both kinds of property with a limitation over, unquestionably after an indefinite failure

of issue, and this the law will sustain. The rule can not bend to the presumed intention, or be given up to effect that intention.

In holding the words of this will to create an estate tail, the daughter takes the personal estate absolutely, not in consequence of the expressed intention of the testatrix that she shall so take it, but because the law has established a fixed legal import to certain words when used in reference to personal estate. That if property of this species be bequeathed to a person and the heirs of his body, the legatee takes such property absolutely and not in tail. But the law has equally well established the legal acceptation of these same words when applied to real estates, that they do not in the latter case give an absolute estate, or one in fee, but an estate tail. As to each species of property these words have their peculiar, appropriate, technical signification, and the subject-matter determines the application to be made: if applied to land they give an estate tail; if to personal property an absolute estate; and although they be used in the same clause of a will and be applied to both real and personal estate, they are to be construed according to the subject-matter to which they are applied, and the very same words in the same clause will be held to vest the one species of property absolutely, and the other in tail. Cases to this effect may be found in 9 Ves. 202; 6 T. R. 307; 16 Johns. 413; 17 Ves. 479.

On the trial below, the counsel for the defendant objected to the admission in evidence of the proceedings of the orphans' court of Sussex county, in relation to the sale of the real estate of H. Heavilo for the paying of her debts and of the deed made pursuant to such sale by B. Johnson as executor of H. Heavilo; alleging that he was not the executor of H. Heavilo.

The sale of the land by Johnson had been returned and approved by the orphans' court.

The order and decree of the orphans' court had not been appealed from, and the court below held that as to every point which it was necessary for the orphans' court to decide upon, to make a rightful order, their decree was conclusive; and that such points or matters could not be inquired into collaterally in the action then on trial. In this opinion we fully concur. To authorize or order an executor or administrator to sell lands to pay the debts of a deceased person, was a jurisdiction committed exclusively in this state to the orphans' court of the several counties, with the right of appeal to the superior court; when the order in question was made the appeal was to the

then supreme court. If one died leaving a will, the orphans' court had exclusively the power to call upon the executor to account for the goods and chattels, and on examination and due proof made before it, if the personal estate should be found insufficient to pay the debts of the deceased, and if the widow, children, or devisees should neglect or refuse to pay their proportionate shares of those debts after a just settlement of the personal estate in that court, then to order the executor to sell such portions of the estate as that court might deem necessary for the payment of debts; which sales the act of assembly declared should be as available as if the lands had been sold by the decedents: and were to be made after notice by advertisements for twenty days in the hundred where the lands were situate, and in three of the most public places in the county, and return of such sale was to be made to the next orphans' court.

All these different matters are essential requisites in a valid decree or to constitute a valid sale, and if any one of these points could be inquired into in the action of ejectment in the court below, all were equally open for investigation even to the advertisement of the lands for twenty days, and the refusal or neglect of the widow, heirs, or devisees to pay the debts. Where sales were to be made of lands of an intestate it was further provided, that before an order was made, the administrator should exhibit to the court an inventory and appraisement and also an account on oath of the debts due from the intestate. These points would on the same principle be inquirable into. To order lands to be sold for the payment of debts, was a jurisdiction exclusively committed by our laws to the orphans' court. Those laws prescribed the manner in which the jurisdiction was to be exercised. Before that court could legally exercise the power delegated, it was to call the executor before it to account for the goods and chattels—of course it was to ascertain who was the executor, and compel him to render such account: if the personal estate was insufficient to pay the debts, and if the heirs or devisees refused or neglected to discharge them, then the court was authorized to order the executor to sell the land, to receive a return of such sale, and inquire if it had been legally made; and if the lands were those of an intestate, an inventory, appraisement, and list of debts were to be submitted to the court before an order could be made. It was undoubtedly necessary that all these matters should be made out to the satisfaction of

that court, before it could legally make a decree to sell the land: as such an order was made by that court, are we not bound to presume that a court thus having jurisdiction has properly exercised its power and had before it all that the law required it should have before it, previous to its making such order. If these matters are allowed to be controverted, inquired into, or proof of them called for, we should in a side way, and not by the legitimate and prescribed course of appeal, review the proceedings in that court, and impeach the decree of a court of competent jurisdiction in a collateral action. We can not adopt such a principle. It has in it the seeds of evil, and would produce confusion in our system, collision in our tribunals, and insecurity in the titles and tenure of real estate.

If a court having jurisdiction of the subject-matter proceeds erroneously, its judgment or decree is nevertheless valid till reversed by the appropriate tribunal of review in the due course of law, and every person is bound by the judicial acts of such a court while they stand unrepealed: Bull. N. P. 244; 3 T. R. 129; Cowp. 815; 1 Str. 481. An executor who has obtained letters testamentary on a forged will represents the estate until those letters are revoked, and payment made to him will discharge the debtor. This principle was decided in a case from 8 T. R., to which we have referred. Would it not be most unreasonable, and be paying but little respect to the judicial acts of a court to whom the matter has been by our laws exclusively confided, to hold that a person before he can with safety purchase land at an execution sale, made under an order of our orphans' court, is bound to ascertain if satisfactory proof exist that such court has pursued in all particulars, the course pointed out by law for the due exercise of its authority, and that all the requisites of a valid sale have been conformed to, and to stand ready at all times to produce such proof whenever an individual may choose to institute an action to take from him the land he has purchased? Ought he not to be permitted to rest securely on the decree and proceedings of the court to whom the jurisdiction was intrusted, as conclusive evidence that such court has duly pursued its authority, and not acted in a way different from that which the law had prescribed that it should act.

A judgment, sentence, or decree can not be impeached on the ground that the will was forged; or that the testator was *non compos mentis*; or that another is executor, for this would be to falsify such judgment or decree: 1 Stark. Ev. 253; 1 Str. 481.

It was a question for the orphans' court, and an essential question for it to decide, whether Benjamin Johnson, as executor of John Heavilo, who was appointed one of the executors of Hannah Heavilo, and gave bond as such, was the executor of Hannah Heavilo, and to be recognized as her legal representative; for until that court had decided that he was the executor it could make no decree authorizing him to make sale of the land. If the court erred in judgment either on the fact or law, a remedy for correction of the error was secured by an appeal to the supreme court whose decision, by our then constitution, was final.

If the error, if any existed, is to be got at and corrected in this way in an action of ejectment, then the court of final resort is not that pointed out by the constitution for such correction. It would have been, under our late judicial system, the high court of errors and appeals, in which not a single judge to whom the constitution assigned the final decision of such matters, would have been on the bench on the final determination of the cause; if the action of ejectment had originated in the supreme court it would have been decided in the last resort by the chancellor and judges of the court of common pleas, who would have formed the court of appeals on writs of error to the supreme court; and under our present constitution the tribunal of final decision would be composed of the chancellor, the associate judge residing in the county, and one other of the judges; and yet neither of the former can sit on an appeal from the decree of the orphans' court. The court of errors and appeals would thus in effect, though indirectly, take to themselves the power of reviewing and annulling the decrees of the orphans' court, a power denied to it by our constitution, and expressly placed elsewhere.

The case of *Rockwell v. Sheldon*, 2 Day, 305, is an authority on the question before us and sustains the principles we have adopted. It was an action of ejectment brought by the heirs at law, in which it was attempted to impeach a sale made by an executor by order of a court of probate for the payment of debts, on the ground that all these previous matters which were necessary by the statute of Connecticut to have been done before the court of probate could make the order of sale, had not been done; that no inventory of the lands in controversy had been made, accepted, and recorded as their statute required, and that therefore the sale was void. The supreme court of errors held, that they were bound to presume all these matters



to have existed before the court of probate exercised its delegated jurisdiction; that it would presume the court of probate had before it the inventory required; that it would presume such inventory was accepted and ordered to be recorded, and that they would not permit an averment that there was no such inventory, or that it had not been accepted or recorded, because as these were requisites such averments would impeach a decree of a court of competent jurisdiction, and that such decree could not be impeached in a collateral action. A like attempt was made to question the regularity of the proceedings of a court of probate, in relation to a sale ordered for the payment of debts, in an ejectment brought by Griswold, one of the heirs of the deceased, against Bigelow, who held under the purchase made at such sale, and which is reported in 6 Day, 264. Chief Justice Hosmer in delivering the opinion of the court, said: "The decrees of a court of competent jurisdiction are conclusive while they remain unreversed, on every question which they profess to decide. They can never be questioned collaterally, but *ex directo* only."

It was the proper course of the devisees and others to have appealed from the appointment of the administrator and the order of sale, and indeed from any other exceptionable decree of probate, and in my opinion this was the only mode of reviewing any of those determinations—from this it results as far as this court is authorized to decide, that an administrator was duly appointed, the claim was legally allowed, and a lawful order of sale was made.

That our views on this subject do not accord with the decisions in Pennsylvania we are aware. Their rule was adopted by Chief Justice McKean in 1798, probably in consequence of their not having a distinct equity tribunal, and succeeding judges have not felt themselves at liberty to depart from it, although it is manifest they were not satisfied with it. Chief Justice Tilghman, in 4 Binn. 104, says: "If the question was open whether a decree of the orphans' court though erroneous ought to stand till reversed by a regular course of appeal and not to be questioned in a collateral way, I should think it well worthy of consideration; but after the frequent decisions by which the decrees of orphans' courts have been called in question in actions of ejectment, I am bound to consider the law settled." He again says, in 6 Binn. 431: "It might be more convenient and render the law more uniform if these proceedings (the orphans' court) were reversible only on appeal, but after the long

practice it is too late to attempt an alteration." He yields to the rule because it has been established by repeated decisions and not because his judgment approves it. We are, however, not thus fettered. In *Larimer's Lessee v. Irwin*, Chief Justice McKean decided that it was the duty of a purchaser at a sale by an administrator or executor, "to see that the proceedings were so far regular as to authorize the sale."

We can not adopt a principle like this, which will take from the decrees of an independent tribunal all binding force or effect. Such sales we think should be sustained to the extent that sales by sheriffs are, and that in neither case should purchasers be required to see that the proceedings prior either to the judgment of a court of law, or to a decree in the orphans' court, were so far regular as to authorize a sale. Judge Yeates, in 6 Binn. 499, says, I consider the general remark to be correct, that the decree of the orphans' court in a case within its jurisdiction is reversible only by appeal, and not collaterally in another suit. The same judge says in 4 Binn. 107, in relation to sales of land made by executors by order of the orphans' court, and also in relation to assignments by that court of the land of an intestate to one or other of the children, It has not been necessary in Pennsylvania to appeal in the first instance to reverse the decree, but to institute actions of ejectments, and in this way review the proceedings of the orphans' court. In this state such a course would virtually be a violation of our constitution, and can not receive our sanction.

The case of *Griffith v. Frazier*, from 8 Cranch, does not in our judgment conflict with the principle on which we proceed. A majority of the court ruled in that case, that an execution on the judgment which had been rendered against Lamotte, the administrator, *cum tes. ann.*, could not legally be levied on the property of Salvador, and therefore that a title through it could not be conveyed to the purchaser, because the judgment was a nullity. It was admitted by Chief Justice Marshall that this decision was at variance with the case in 1 Wils. 302. That the regularity of an execution under which a sale has been effected by a sheriff, can be inquired into collaterally in an action of ejectment, is a position we are not prepared to admit; certainly it can not if the execution be voidable only and not void: 1 Salk. 273; 1 Wils. 302; 8 Johns. 361; 3 Cai. 271.

The court of appeals of South Carolina in the case of *Ford v. Travis*, cited 8 Cranch, 14, had decided that after probate made of a will, a grant by the ordinary of administration was

void, although the executor might be absent from the state. It was established by the highest tribunal as the law of that state, that the ordinary having taken probate of a will, or issued letters testamentary, had no longer jurisdiction over the subject, but that it was exhausted, and that he had no jurisdiction while the executor was living to issue other letters, as he had no power to revoke or annul the letters issued.

This principle was adopted by the supreme court of the United States, in the case in 8 Cranch, and they declare that the administration granted to Lamotte was granted by a court having no jurisdiction in the particular case, and was therefore absolutely void: pp. 27, 28. Had the orphans' court of Sussex county, after having ordered and effected a sale of the land of H. Heavilo through an executor, and confirming the same, subsequently assumed a jurisdiction and a second time ordered and effected a sale of the same lands to pay the debts, the principle fixed in 8 Cranch might well be applied; for by the first sale and its confirmation their jurisdiction over the subject-matter was at an end, and an attempt again to exercise the same power would be a nullity; an assumption of jurisdiction which they did not possess. Such however is not the case before us: by reason of the insufficiency of the personal estate of H. Heavilo to pay debts, a sale of her land was rendered necessary: the only jurisdiction to effect this was the orphans' court: to it was committed the power to call the executor of H. Heavilo before it, ascertain the necessity of a sale, and to order the representative or executor to make a sale: having jurisdiction of the subject-matter, which is the sale of the land, the order or decree of the court or the proceedings consequent thereon, though they may be erroneous are not void; they may be voidable, but till reversed in the due course of review, they stand with binding force and can not be impeached collaterally. Whether letters testamentary had been issued to John Heavilo alone, or to John and Roderick jointly; whether Roderick survived John or died before him; whether if he survived he was the executor of H. Heavilo or had renounced, were matters necessary for the orphans' court to pass upon to enable it to decide whether B. Johnson as executor of J. Heavilo, was the legal representative of H. Heavilo; and we are bound to presume that the orphans' court, thus having jurisdiction of the subject-matter of sale, had satisfactory proof before it to justify it in the conclusion to which it did come, that he was the legal representative. If that court erred the error can be corrected

by appeal only, and not collaterally in the manner it was attempted.

Chief Justice Marshall says at page 23 of the case in 8 Cranch: "Though letters of administration be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because the ordinary had power to grant letters of administration in the case." Apply this principle and the reason of the principle to the case before us. If the orphans' court order a sale of land of a person deceased, to be made by one who it subsequently appears had not complied with all those requisites which were necessary to constitute him legally the executor of the deceased, still the act of the court according to the principle stated in the case of *Griffith v. Frasier*, would be binding, until annulled by the proper tribunal of review; because that court had jurisdiction of the subject-matter, that is, of the sale of lands to pay debts, and had the power to order the sale, and their act though voidable was not void. The court below proceeded on this principle, that as the orphans' court had jurisdiction and authority to order the sale of H. Heavilo's real estate to discharge her debts, they would hold its decree as binding, and not allow it to be impeached collaterally on the trial then before it. We can not suppose that the late court of common pleas would have permitted a sale of lands made by a sheriff under process from the supreme court, to have been impeached collaterally in a trial before it by an averment that the inquisitors who condemned the land were not freeholders, or that the sheriff had not given security; and yet this question of security is one of which the common pleas had exclusive jurisdiction, and not the supreme court from which the sale was authorized: the sales might have been voidable but they were not void, and therefore could not be assailed in this way.

The judgment of the court in admitting in evidence the records of the deeds which had not been recorded within a year was we think correct, when we consider the practice that has prevailed for very many years throughout each county of the state of recording deeds duly proved or acknowledged after the year, and the decisions made in at least one of our courts in allowing office copies of such to be received in evidence; we fear we should be unsettling the titles to much of the real property of the state, were we to adopt a different rule from that of the court below, inasmuch as the supreme court for at least thirty years had recognized by their decisions as competent evidence

deeds so recorded. We go on the decisions thus made establishing a rule of property which it is not wise now to shake, and the practice that it gave rise to or recognized, and not on the words of the act of assembly, which might well bear a different construction; besides, the admission of deeds thus recorded, or copies thereof in evidence, though not within the words of the act extending the time for recording deeds, 8 Del. Laws, 19, and the supplements thereto, is, we apprehend, within the spirit and design of those acts: under those acts all deeds proved or acknowledged in the manner prescribed by the laws of the state could be recorded and copies thereof be evidence, no matter when executed. Had these deeds been placed on record subsequently to the passing of those acts, there would have been no question on this point: as they were recorded previously thereto, having been duly proved, we think the spirit and object of the act are promoted by recognizing them as valid records.

We are therefore unanimously of opinion that in the judgment of the court below there is no error, and that it must be affirmed.

Judgment affirmed.

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"HEIRS" DEFINED.—*Den v. Barnes*, 6 Am. Dec. 547.

EXECUTORY DEVISE OR ESTATE TAIL, WHEN CREATED.—A limitation over on a devise to one and his heirs forever in the words, "should the devisee" depart this life without lawful issue, is good as an executory devise: *Anderson v. Jackson*, 8 Id. 330. So also *Jackson v. Staats*, 6 Id. 377; *Deihl v. King*, 9 Id. 407.

CASES  
IN THE  
SUPREME COURT  
OF  
ILLINOIS.

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SLOCUMB v. KUYKENDALL.

[1 SCAMMON, 187.]

**IN SLANDER, THE SUBSTANCE OF THE WORDS only need be proved.**

**IDEM—BUT THE PROVING of words of similar import, is not proving the substance of the words laid.**

**CASE** for slander. The opinion states the case. Nonsuit was ordered, whence an exception was taken.

*A. P. Field and H. Eddy*, for the plaintiff in error.

*Jesse J. Robinson and W. J. Galewood*, contra.

By Court, **SMITH, J.** This was an action of slander for words imputing theft.

The declaration contained three counts: 1. For the words: "The miller stole my wheat, and he was no other man than John C. Slocumb;" 2. "He stole my wheat;" and 3. "John C. Slocumb is a thief; he stole my wheat."

The defendant pleaded not guilty, and not guilty within one year. On the trial, after the plaintiff's evidence had been heard, the defendant moved the court to instruct the jury to find as in case of a nonsuit.

The court instructed the jury accordingly, and also that the evidence did not support either count of the plaintiff's declaration. To these instructions the plaintiff excepted. The jury found for the defendant.

The only error assigned is the instructions of the circuit court, and we are now to inquire whether or not they were

correct. It will not be doubted, that the rule which heretofore required the plaintiff to prove the words to have been spoken precisely as laid, has been relaxed, and that it will now be sufficient to prove the substance of them as charged; while, however, this rule is admitted to its fullest extent, we still understand that the proof of equivalent words will not be proving the substance of those charged to have been spoken. To prove words of similar import will not surely be proving the substance of those laid, but the proving of other and different words. In the case of *Mailland v. Goldney*, 2 East, 438, the court say: "Though the plaintiff need not prove all the words laid, yet he must prove so much of them, as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander." The case of *Olmsted v. Miller*, 1 Wend. 510, supports the same doctrine.

This rule should be adhered to. Further relaxation would be attended, in my opinion, with infinite mischief. The allegation and the proof should correspond; yet if a party be charged with the speaking of one set of words, and the proof show another set, of an equivalent character, and that be admitted to be sufficient to sustain the cause of action, how is the party to be prepared to defend himself? If this latitude be indulged in, and proof of equivalent words be sufficient, how will the defendant be able to know what he must come prepared to meet? One set of words is charged, another is proved, and the party surprised and held answerable for what he might have rebutted or explained by testimony, had he had reason to suppose such proof would have been offered. The introduction of such a course seems to me subversive of the first principles of the rules of evidence, and ought not to prevail. Besides, the uncertainty of the memory of witnesses, and their understanding of the import of words, and the sense in which they may have understood them to have been used, would render a party accountable for their misapprehension, very frequently, if they could be allowed to testify to the import of his expressions.

It is the province of the court and jury to construe his words, and not that of the witnesses. Apply this reasoning to the case before us, and it will be readily perceived that the proof does not sustain either of the counts of the declaration. From the bill of exceptions, such of the testimony as did not fall within the plea of the statute of limitations, is stated by one witness to refer to a conversation had with the defendant in January, 1833, and is narrated by the witness in these words: "That he

heard defendant say, that he had heard Slocumb had taken too much toll from others, and that charges had been made against Slocumb to Mr. Graves, the owner of the mill; that he saw Slocumb go to the hopper, and take out two half bushels of wheat, and put it away, and put one of them in a dark corner; that what he knew, he knew, and what he saw, he saw; that the defendant asked Slocumb what he was doing. Slocumb said he was taking toll; that Slocumb, when taking the wheat, looked over his shoulder, as if to see if anybody saw him; and defendant was talking about his wheat being lost at the mill where Slocumb had taken his wheat. Defendant had taken thirty-two bushels of wheat to the mill on this occasion."

The other witness refers to a conversation with defendant at another time, and says that Slocumb's name was mentioned. Defendant asked if it was John Slocumb who had attended the mill at New Haven. Witness replied that it was, but that he wrote his name John C. Slocumb. Defendant then said, Well, he is the man who took my wheat; there was too much toll taken, from the quantity of wheat I took to mill, and the flour I got. I saw him take two half bushels out of the hopper, and put it away. I asked him what he was doing. He said he was taking toll. This was in the night. Defendant said I would not swear, he, Slocumb, stole my wheat, but if I had to swear, I would swear I believe he stole my wheat.

It will be remarked, that the conversations detailed by the two witnesses, happened at different periods, and were entirely disconnected. It is not the inquiry now, whether or not this language might not be actionable, if laid as proved, with the necessary averments, though it might perhaps involve a question of doubt whether the defendant intended to charge the plaintiff with a felonious intention in taking the wheat; and whether the taking of too much toll, unless accompanied by indisputable evidence of such intent, could constitute a larceny; but whether the language proved to have been used, taken separately and disconnectedly, as stated by each witness, sustains either count of the declaration, I can not conceive that either, taken separately, supports either of the counts in the declaration. The proof can be viewed in no other light than as establishing the speaking of equivalent words, and by no means as supporting the proof of the substance of the words as laid. I am therefore of the opinion that the instructions of the court were correctly given, and that the judgment of the circuit court ought to be affirmed with costs.

Judgment affirmed.



THE SUBSTANCE OF THE WORDS LAID IN SLANDER may be proved to sustain the declaration, but it will not do to prove words of equivalent import: *Patterson v. Edwards*, 2 Gilm. 723; *Sanford v. Gaddis*, 15 Ill. 230; *Wallace v. Dixon*, 82 Id. 205, in each of which cases *Slocumb v. Kuykendall* is cited. The same rule is laid down in *Hersh v. Ringwalt*, 2 Am. Dec. 392; *Wheeler v. Robb*, 12 Id. 245 and note; *Estes v. Antrobus*, 13 Id. 496.

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### MORTON v. BAILEY.

[1 SCAMMON, 213.]

THE DEFENDANT IS NOT BOUND TO SET OFF HIS DEBT against the plaintiff's demand, except in suits before a justice of the peace.

UPON A CREDITOR'S EXHIBITING A CLAIM AGAINST AN ESTATE, the administrator is not bound to set off against such claim a debt due the estate from the creditor.

A DEFENDANT SUFFERING A DEFAULT CAN NOT EXCEPT TO TESTIMONY taken on the inquest, but may cross-examine witnesses.

FOR THE COLLECTION OF HIS FEES, a clerk, justice of the peace, or judge of probate may have an action. The remedy by fee bill given by statute is cumulative.

ASSUMPSIT. Judgment for the plaintiff, whence this appeal. The case appears from the opinion.

*J. Pearson*, for the appellant.

*O. B. Ficklin*, contra.

By Court, LOOKWOOD, J. This was an action of assumpsit commenced in the circuit court of Coles county, by Bailey and wife, in her right as administratrix of Jones, deceased, against Morton. The declaration contains several counts. The defendant pleaded in bar of the suit, that after Mrs. Bailey was appointed administratrix, he, said Morton, exhibited before the judge of probate of Coles county, in pursuance of notice given by said administratrix, his claim against the estate of said Jones, consisting of charges for work and labor done and performed, goods sold, money lent and had and received by said Jones in his life-time—that the judge of probate gave judgment for Morton on the amount or claim thus exhibited; and that plaintiffs below might have set off the demands mentioned in the declaration against the claim thus exhibited by Morton, but the plaintiffs neglected to make such set-off, whereby the plaintiffs are barred, etc.

To this plea the plaintiffs demurred, and the court sustained the demurrer. The defendant not farther answering, judgment was given by default, and a jury called and sworn to inquire of damages. On the taking of the inquest in the circuit court, the defendant excepted to several portions of the testimony offered by the plaintiffs.

Two questions are presented for the consideration of this court, to wit: 1. Was the administratrix barred by the proceedings before the judge of probate? and 2. Can the defendant on the taking of an inquest by default, except to the opinion of the court in receiving or rejecting testimony?

At common law a defendant could not set off his demand against the plaintiff's debt, and our statute of set-off is permissive, but not compulsory. According, then, to the general law of the land, a party defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace. Is there any provision in the "act relative to wills and testaments, executors and administrators, and the settlement of estates," and the several acts amendatory thereof, requiring administrators, upon the exhibition by a creditor of his claim against the estate, to set off any debt or demand such estate may have against such creditor? The court have looked in vain for any such provision in the acts above enumerated, and are accordingly of opinion that the administratrix was not barred of her action by the proceedings before the judge of probate.

On the point whether the defendant on the execution of an inquest, can take a bill of exceptions, the court are of opinion that the defendant by suffering judgment to go by default, is out of court, and has no right to except to testimony. The defendant is permitted, however, to cross-examine the witnesses, but can not introduce testimony, or make a defense to the action. Should improper testimony or wrong instructions be given, the proper course is to apply to the court to set aside the inquisition, and grant a new inquest.

The counsel for the plaintiff urged, on the argument, that no action lies by an officer for the collection of fees due him as a clerk, justice of the peace, or judge of probate. This position is clearly erroneous. The remedy given by statute, to collect fees by making out a fee bill and delivering it to an officer, is a cumulative remedy, but does not take away the common law remedy by suit.

The judgment, therefore, must be affirmed with costs.

Judgment affirmed.

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ON A JUDGMENT BY DEFAULT, THE DEFENDANT CAN NOT INTRODUCE EVIDENCE on the inquest: *Chicago and Rock Island R. R. Co. v. Ward*, 16 Ill. 527, 531. And on a judgment on demurrer for want of plea, the same result arises; the defendant may cross-examine witnesses, but can not enter a defense: *Binz v. Tyler*, 79 Ill. 253.

## INDEX TO THE NOTES.

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- ACTION**, by or against *quasi* corporation, 695.  
on lost or destroyed notes, 128.
- ADMINISTRATOR**, can not contract for sale of land, 321.  
contracts with, do not bind the estate, 645.  
when commences holding as guardian, 461.  
when commences holding as trustee, 461.
- ADVERSE POSSESSION**, of street or public square, 569
- AGENT**, competency of, as witness for principal, 343.  
liability for wanton act of, 688.  
ratification of unauthorized deed of, 343.  
possession by, is not adverse to principal, 358.  
seal, when must have authority under, 344.
- APPEAL**, in criminal cases, right of state to, 471-480.
- ATTORNEY**, communications to, when privileged, 334.
- BANK-BILLS**, offer to return when required, 191.  
payment in those of insolvent bank, 188-192.  
whether to be treated as cash or as notes, 188.
- BANKRUPTCY**, promise to pay debt discharged by, 287.
- BASTARD**, inheriting through, 537.
- BIGAMY**, competency of wife as witness, 390.
- BOUNDARY**, parol settlement or change of, 121.
- CHECKS**, must be presented for payment, 196.
- CHILD**, illegitimate, inheritance through, 537.
- CHOSES IN ACTION**, creditor's bill to reach, 459.
- COMMON CARRIER**, "dangers of river," what are, 517.  
defined, 517.  
liability of, 517.  
usage to control liability, 518.
- CONFLICT OF LAWS**, indorsement, by what law governed, 142.
- CONSIDERATION**, debt discharged in bankruptcy, 288.  
forbearance to sue, 353.  
moral, not sufficient, 287.
- CONSIGNOR**, when may sue for loss of goods, 518.
- CONSTITUTIONAL LAW**, criminal cases, new trials in, forbidden, 471-480.
- CONTRIBUTION**, sureties not entitled to, from co-surety, when, 612.
- CORPORATION**, by law, authorizing vote by proxy, 60.  
proxy, voting by, 63.
- CRIMINAL LAW**, acquittal, verdict of, is final, 471.  
acquittal, new trial not granted after, 472.  
fraud in procuring acquittal, 475.  
new trial, prosecution can not obtain, 474.

**DAMAGES**, aggravation of, 684-689.

compensation is central idea of law of, 684.

corporation liable for exemplary, 688.

exemplary, when allowed, 685.

for criminal acts, 687.

form of action does not vary, 688.

for suing out attachment, 689.

for wanton act of agent, 688.

intent of wrong-doer, 686.

malice, imputed to wrong-doer, when, 686.

negligence, when justifies exemplary, 687.

punitive, 685.

vindictive, examples of, 688.

**DECLARATION OF PARTIES**, to a combination to defraud, 115.**DEDICATION TO PUBLIC USE**, acceptance, formal, when required, 560.

acceptance of, how proved, 562, 563.

according to map or plat, 567.

administrator may make a, 561.

adverse possession to, 569.

changing the use, 569.

common law, 560.

*cul de sac* may be subject of, 562.

definition and history, 559.

estoppel to deny, 563.

fee in the land need not pass, 567.

grantee in being, not requisite, 566.

how made, 560, 562.

intent to dedicate, how proved, 562.

partial, 567.

public squares, etc., 561.

purposes for which may be made, 561.

revocation of, 569.

statutory, 559.

trustees may make, 561.

user as evidence of, 564.

when acceptance may be made, 566.

who may make, 560.

**DEFINITION**, of common carrier, 517.

of common law dedication, 560.

of dangers of the river, 517.

of dedication to public use, 559.

of law of the case, 634.

of *stare decisis*, 631.

of statutory dedication, 560.

**ELECTION**, between dower and legacy, 448.

irregularity in notice of, 110.

**ESTOPPEL**, admission or silence occasioned by ignorance, 119.

to deny title under which one enters, 119.

**EVIDENCE**, admission of incompetent, when ground for a new trial, 11a.

notary's protest as, 522.

of prosecution, to mitigate damages, 493.

- EXECUTION**, fraudulent sale under, conveys no title, 116.  
 leaving debtor in possession after levy, 103.  
 levy of, direction to keep secret, 104.  
 levy of, what valid, 104.
- EXECUTOR**, when holds as trustee, 461.
- FRAUD**, acquittal procured by, 475.
- HUSBAND AND WIFE**, adultery of one can not be proved by the other, 373.  
 articles of separation, validity of, 87.  
 conspiracy, one can not testify against the other, 378.  
 personal injury to one may be proved by the other, 377.  
 testimony of one against the other, 377.
- INDORSER**, collateral security to, inures to creditor, 720.
- INFUNCTION**, against voting by proxy, 62.  
 attaching creditor entitled to, 713.  
 to protect easement, 84.
- JURISDICTION**, facts conferring, must be stated, 146.  
 how pleaded and shown, 144.  
 over party, how pleaded, 146.  
 statutes concerning, judicial notice of, 145.  
 statutory rules regarding pleading, 148.
- LAW OF THE CASE**, definition and extent of, 634.
- LICENSE**, building erected under, 681.  
 parol, when revocable, 681.  
 purchaser without notice of, 681.
- LIMITATIONS**, commencement of, in favor of fraudulent vendee, 622.  
 commencement of, under void gift, 503.
- LOST OR DESTROYED NOTE**, action on, 129.
- MALICE**, when imputed to wrong-doer, 686.
- MISDEMEANOR**, new trial after acquittal, 473.
- MONEY**, paid under mistake, recovery of, 489.  
 paid voluntarily, recovery of, 490.
- MORTGAGE**, cancellation, effect of, unauthorized, 586.  
 note barred by limitations, 727.  
 release of, vacating in equity, 586.
- MUNICIPAL CORPORATION**, indictment of, 99.  
 liability of, for neglect of duty, 99.  
 nuisance, power to destroy, alleged, 98.
- NAME**, junior no part of, 534.
- NEGLIGENCE**, exemplary damages for, 687.
- NEW PROMISE**, how alleged, 289.  
 to pay debt discharged in bankruptcy, 287.
- NEW TRIAL**, acquittal can not be set aside by, 472.  
 error or inadvertence, when no ground for, 474.  
 fraud or trick of defendant, when no ground for, 476.  
 in penal actions, 480.  
 misconduct of jury, when no ground for, 475.  
 state can not procure in a criminal cause, 472.

**OBITER DICTUM**, what is a, 633.

**PARTIES**, bound by judgment against validity of a will, 223.  
     not in *esse*, when bound by judgment, 223.  
     when bound by judgment against another, 223.

**PARTNERSHIP**, realty of, conveyance by surviving, 455.  
     realty of, how descends, 454.  
     realty of, when treated as personalty, 455.

**PAYMENT**, in bills of insolvent bank, 188-192.  
     in notes of insolvent maker, 191.

**PEERS**, might vote by proxy, 60.

**PLEADING**, bill, when may be framed with double aspect, 90.  
     jurisdictional facts, distinction between plea and declaration, 146, 147.  
     jurisdictional facts to support judgment of inferior court, 144.  
     jurisdictional facts, when need not be averred, 144.  
     jurisdiction of foreign tribunal, 149.

**PLEDGOR**, of stock is entitled to vote, 62.

**PRINCIPAL**, suing on contract of agent, 137.

**PRIVILEGED COMMUNICATION**, liability for, 158.

**PROXY**, by-laws authorizing vote by, 60.  
     injunction against use of, 62.  
     power of inspectors to determine, 62.  
     revocation of, 62.  
     statutes authorizing vote by, 61.  
     voting by, at common law, 60-63.

**PUBLIC USE**, dedication to, 84.

**RATIFICATION**, by parol of deed of agent, 343.  
     by parol of deed of partner, 343.

**REMAINDER-MAN**, when bound by judgment against the tenant in possession, 223.

**RENT**, lessee liable for, after destruction of premises, 71.

**REPUTATION**, proving marriage by, 487.

**REVERSIONER**, bound by judgment against tenant in possession, 223.

**REVOCATION**, of parol license, 681.

**SALE BY SAMPLE**, warranty arising from, 166.

**SET-OFF**, of judgment after assignment, 307.

**SHERIFF'S DEED**, certainty of description required in, 524.

**SPECIFIC PERFORMANCE**, payment alone not sufficient, 745.

**STARE DECISIS**, affirmance by divided court, 633.

    law of the case, 634.  
     rule of, defined, 631.  
     rule of, limitations of, 632.  
     rule of, reasons for, 632, 633.  
     rules of property should not be changed, 633.

**STATUTES**, conferring jurisdiction, pleading of, 149.  
     jurisdiction, provisions regulating pleading of, 148.

**STATUTE OF FRAUDS**, payment is not sufficient to take case out of, 745.

**STREETS**, adverse possession of, 569.  
     dedicating by maps and plans, 568.

**SURETY**, collateral security taken by, inures to creditor, 720.  
     contribution, when not subject to, 612.

- TENANT**, adverse possession by, 466.
- TENDER**, effect of, when destroyed, 177.  
     makes the tenderer a bailee, 177.  
     releases original contract, 177.
- TITLE**, estoppel from asserting, arising from silence, 355.
- TRESPASS**, exemplary damages for, 685.
- TOWN**, action against, right of inhabitant to defend, 695.  
     inhabitant of, competency as witness for, 695.  
     judgment against, who bound by, 695.
- USAGE**, admissibility of, in case of writings, 166.
- VENDOR'S LIEN**, law of, in North Carolina, 253.
- VOTING**, by pledgor of stock, 62.  
     proxies not allowed at common law, 60.
- WATER**, detention of, by mill owner, 318.  
     right to uninterrupted flow of, 318.
- WIFE**, competency of, to testify against husband, 377.
- WILL**, verdict against, who bound by, 223.
- WITNESS**, husband and wife, when may testify against each other, 377.  
     personal injury from husband, wife may testify to, 377.  
     testimony of absent, taken at former trial, 116.  
     wife, competency of, to testify to battery on her by husband, 378  
     wife, competency of, to testify to bigamy of husband, 380.  
     wife, competency of, to testify to conspiracy by husband, 380.





# INDEX.

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## ACCORD AND SATISFACTION.

See PAYMENTS, 5.

## ACTIONS.

FOR THE COLLECTION OF HIS FEES, a clerk, justice of the peace, or judge of probate, may have an action. The remedy by fee bill given by statute is cumulative. *Morton v. Bailey*, 767.

## ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

## ADULTERY.

See DIVORCE.

## ADVERSE POSSESSION.

1. ADVERSE POSSESSION is the actual occupation of land as one's own. It is not necessary to its existence that there should be any act or declaration of the occupant affirming an exclusive claim, if from the manner in which the possession took rise, as when taken under a parol gift, it appear that the occupant held the land as his own. *Sumner v. Murphy*, 397.
2. IT IS NO DEFENSE AGAINST THE LEGAL TITLE that this was retained by plaintiff under an agreement that this should be done in order that the land might be effectually shielded against the claims of defendant's creditors. *Id.*

See CO-TENANCY, 2; LANDLORD AND TENANT, 6, 7, 8, 9.

## AGENCY.

1. AGENT IS PERSONALLY LIABLE ON HIS CONTRACTS, unless he shows such an authority to contract as will bind his principal. *Collins v. Allen*, 130.
2. WHERE A BROKER OR AGENT PURCHASES GOODS, WITHOUT DISCLOSING HIS PRINCIPAL, the principal, when discovered, is nevertheless liable for the price, and may also sue on a warranty in the contract. *Beebe v. Robert*, 132.
3. WHERE A SEALED CONTRACT IS EXECUTED BY AN AGENT, A PAROL ACKNOWLEDGMENT by the principal that he had authority, is competent evidence of an authority under seal. *Blood v. Goodrich*, 152.
4. AN AGENT IS A COMPETENT WITNESS for his principal, except in cases where the principal is sued on account of the negligence of the agent. *McDowell v. Simpson*, 338.

5. AN AGENT MAY BE A WITNESS to prove his own authority. *Id.*
6. A LEASING OF LANDS by a person unauthorized may be ratified by the owner accepting the rent as it becomes due. *Id.*
7. A LEASE OF LANDS for a longer period than three years by an unauthorized agent, can only be ratified by the owner in writing. *Id.*
8. PAROL RATIFICATION OF SUCH A LEASE would give to it no greater force or effect than if the owner had himself leased it by parol, which would be to create an estate at will, and if the tenant was permitted to hold it for a year or more, an estate from year to year, which could be terminated only by giving a three months' notice to quit. *Id.*
9. A PRINCIPAL IS BOUND BY THE ACTS OF HIS AGENT, done within the regular course of his employment, even though done in opposition to his special command, if this command was not known, at the time, to the person contracting with the agent. *Topham v. Roche*, 387.
10. A SALE OF LANDS UNDER PAROL AUTHORITY is confirmed by an admission of the authority by the principal, in his answer to the bill in equity, in which the transaction is relied upon. *Stoney v. Shultz*, 429.

#### AMENDMENTS.

See PLEADING AND PRACTICE.

#### APPEAL.

See CRIMINAL LAW, 6.

#### APPLICATION OF PAYMENTS.

See PAYMENTS, 1.

#### ARREST.

1. AN ARREST MUST HAVE BEEN ORIGINALLY ILLEGAL, or become so by subsequent abuse of it, to constitute duress in law. *Stouffer v. Latham*, 297.
2. LAWS OF THE PLACE where an arrest is made must determine its legality or illegality; and in the absence of proof to the contrary, an arrest upon legal process in another state will be presumed justifiable. *Id.*

#### ASSAULT AND BATTERY.

1. PROVOCATION TO MITIGATE DAMAGES for an assault and battery is not admissible in evidence in an action for such injury, unless it immediately preceded it, so that the blood had not time to cool. *Jacaway v. Dula*, 492.
2. ACCUSATION OF THEFT made by the party assaulted against the assailant the day before the assault, and not shown to have been communicated to the assailant on the day of the assault, is not admissible in evidence in mitigation of damages in such action. *Id.*

#### ASSESSMENT.

See MANDAMUS, 1; TAXATION, 3.

#### ASSIGNMENT.

1. WHERE AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS FRAUDULENT, an auctioneer to whom the assignees have intrusted the effects to be sold

has no lien upon the moneys realized from the sale, as against judgment creditors of the assignor, the auctioneer being himself a creditor, but having agreed to the assignment. *Hone v. Henriquez*, 204.

2. A COMPOSITION AND DISCHARGE OF A DEBTOR WILL BE SET ASIDE where it was induced by the representations of the debtor of his insolvency and poverty, it appearing that he had prior thereto fraudulently conveyed away all of his property. *Richards v. Hunt*, 545.

#### ASSUMPSIT.

1. ASSUMPSIT FOR GOODS FURNISHED, without request, express or implied, or acceptance of the goods, by the defendant, even though the benefit of the goods has reached him, will not lie. Therefore, where one assuming to act as agent for defendant, in his absence, caused to be furnished to his shop goods which were then used in the trade of the shop, said assumed agent not having authority for such purpose, defendant was held not liable. *Topham v. Roche*, 387.
2. ONE PAYING MONEY UNDER A MISTAKE of fact to one not entitled to receive or retain it, may recover it in assumpsit. *Dickins v. Jones*, 488.

#### ATTACHMENTS.

See INJUNCTIONS.

#### ATTORNEY AND CLIENT.

1. AN ATTORNEY WILL NOT BE PERMITTED to divulge knowledge obtained in the course of his professional intercourse with his client. *Beltzhoover v. Blackstock*, 330.
2. COMMUNICATIONS FROM A CLIENT to his attorney to be privileged, do not require to be made while a cause is depending in court; it is sufficient if the attorney was consulted professionally, and acted or advised as counsel. *Id.*

See MAINTENANCE.

#### AUDITA QUERELA.

1. AN AUDITA QUERELA WILL NOT LIE, at the instance of one not a party to the judgment, to set aside a levy and sale upon the ground that, though the property sold was covered by the judgment lien, yet that at the time it belonged to the petitioner, and there was, as known to the sheriff and purchaser at the sale, ample property belonging to the judgment debtor which might have been sold in satisfaction of the judgment. *Longworth v. Screven*, 381.
2. THE ADVANTAGES OF AN AUDITA QUERELA may all be obtained by motion, under the modern practice. *Id.*
3. AN AUDITA QUERELA is a proceeding to prevent, recall, avoid, or set aside an execution, founded upon matters arising subsequent to the judgment, which, therefore, the party had not opportunity to plead. *Id.*

#### BANKS.

See NEGOTIABLE INSTRUMENTS, 9, 28; TAXATION, 2.

#### BANKRUPTCY AND INSOLVENCY.

1. AN ABSOLUTE UNCONDITIONAL PROMISE by a person to pay a debt from which he has been discharged by proceedings in insolvency, creates a

binding contract upon which an action may be maintained against him. *Earnest v. Parks*, 280.

See ASSIGNMENT.

### BASTARDS.

See SUCCESSION.

### BEQUESTS.

See LEGACIES AND LEGATEES.

### BOUNDARIES.

1. **DISPUTED BOUNDARY BETWEEN TWO ADJOINING PROPRIETORS** may be settled by express parol agreement, executed immediately and accompanied by possession according thereto. *Kip v. Norton*, 120.
2. **LONG ACQUIESCENCE** by one of such proprietors, in a boundary established by the other, is evidence of an agreement. *Id.*
3. **ACQUIESCENCE FOR ONLY FOUR OR FIVE YEARS** in a boundary established by mistake as to the true location, is not sufficient evidence of an agreement. *Id.*
4. **QUESTIONS IN RELATION TO BOUNDARY LINES** are for the determination of the jury, on the principle that the lines on the ground constitute the true survey. *Comegys v. Carley*, 356.

### BROKERS.

See AGENCY, 2.

### CASE.

See DAMAGES, 4.

### COMMON CARRIERS.

1. **LIABILITY OF COMMON CARRIER.**—The relation of common carrier continues from the time of the shipment of goods until their delivery at the point of destination, unless such relation has been interrupted by some act of the consignor or owner; but a privilege, given to him in the bill of lading, of reshipping the goods in case of low water, does not release him from his obligation to deliver safely, and he is liable for any injury caused to the goods during such reshipment. *McGregor v. Kilgore*, 260.
2. **MEASURE OF DAMAGE FOR INJURY** caused by neglect of carrier is the value of the goods at the place of delivery. *Id.*
3. **OWNER OF STEAMBOATS** transporting goods on freight are common carriers, and are liable for all losses in the course of their employment as such, except those occasioned by the act of God or the public enemy. *Harrington v. McShane*, 321.
4. **USAGE—COMMON CARRIERS.**—Where, by the usage of the place, goods shipped on freight are consigned to the master of a steamboat, who is also part owner, for sales and returns, the owners are liable, as common carriers, for the payment of the proceeds to the shippers. *Id.*
5. **BOATMAN ON THE MISSISSIPPI RIVER** is liable as a common carrier for goods which he undertakes for a reward to convey from place to place on the river. *Turney v. Wilson*, 515.

6. **COMMON CARRIER IS LIABLE** for all losses not occasioned by the act of God or public enemies, except where he has provided otherwise in his contract. *Id.*
7. **EXCEPTION OF "DANGERS OF THE RIVER,"** in the contract of a common carrier on the Mississippi, exempts him from liability for losses which could not have been prevented by human skill and foresight. *Id.*
8. **BURDEN OF PROOF** is on the carrier to show that a loss arose from a cause for which he was not liable. *Id.*
9. **"DANGERS OF THE RIVER"** mean, in such a contract, all hidden obstructions in the river, such as rocks, logs, sawyers, etc., which could not be foreseen or avoided by human prudence. *Id.*
10. **EVIDENCE OF A LOCAL CUSTOM** in such a case, that the carrier is to be liable only for losses caused by his negligence or dishonesty, is not admissible to vary his written contract. *Id.*
11. **PROOF OF LOSS FROM AN UNKNOWN CAUSE** will not excuse the carrier. *Id.*
12. **PROOF THAT THE CONSIGNOR IS THE OWNER** of goods entitles him to maintain an action against a carrier for their loss. *Id.*

#### COMPOSITION.

See **ASSIGNMENT**, 2.

#### CONFLICT OF LAWS.

See **ARREST**, 2

#### CONSIDERATION.

See **FORBEARANCE**.

#### CONSPIRACY.

**ACTS OF CONSPIRACY ARE INDICTABLE**, if their tendency be to corrupt or pervert the course of justice, in a civil or criminal proceeding, the definition including attempts to fabricate or destroy evidence, to be used in such proceedings. *State v. De Witt*, 371.

#### CONSTITUTIONAL LAW.

1. **THE LEGISLATIVE POWER EXTENDS** to providing for the laying on, regulating, and keeping in repair, roads, highways, bridges, and ferries, necessary for the public use and convenience. *Dyer v. Tuscaloosa Bridge Co.*, 655.
2. **THE LEGISLATURE MAY AT ANY TIME RESUME POWERS** previously delegated by it to a public agent; therefore where a grant of a ferry franchise, by the county judge, was made, and the franchise was burdened by law with a power in the county judge to establish any other similar franchise demanded by public convenience, the granting of such second franchise, by the legislature, can not be complained of. *Id.*
3. **NOTICE OF AN APPLICATION** to the legislature for an increase of tolls on a turnpike road under the control of the applicants, is not absolutely necessary to be given to a party engaged in carrying the mails over said road under a contract with the United States, but who is not bound by his contract to carry the mails on said road, and the want of such notice will not avoid the grant passed in pursuance of such application. *Derby T. Co. v. Parks*. 700.

4. ALLEGATION IN THE APPLICATION, OF A MISTAKE in the charter, authorizing the construction of such road, with respect to the rate of tolls, but referring to the inequality of the tolls as evidently proving that fact, is a matter of inference, and, though erroneous, is not necessarily fraudulent. *Id.*
5. OMISSION TO STATE in such application that the mails are carried over the road under a contract with the United States, by a third party, is not such a suppression of the truth as to amount to a fraudulent concealment. *Id.*
6. FRAUD IN OBTAINING AN ACT of the legislature will not be presumed, but must be clearly proved before the court will pronounce the act void. *Id.*
7. LEGISLATIVE GRANT IS A CONTRACT.—A legislative grant to an existing turnpike corporation, of the right to increase its tolls, is a contract. *Id.*
8. REPEAL OF SUCH A GRANT IMPAIRS THE OBLIGATION of the contract, and is unconstitutional, unless the right of appeal is reserved or the corporation consents. *Id.*
9. CONSIDERATION IS UNNECESSARY to render binding an executed legislative grant of such a right. *Id.*

See FRANCHISES.

#### CONTRACTS.

1. LAW WILL NOT ASSIST PERSON WHO INTENTIONALLY AIDS ANOTHER in an illegal act, and where it is unlawful to keep a nine-pin alley appurtenant to a coffee-house, a carpenter who builds such an alley, knowing the purpose for which it was constructed, can not recover the price of erecting it. *Spurgeon v. McElwain*, 266.
2. CONTRACT BY WHICH AN ADMINISTRATOR AGREES TO SELL certain real property, belonging to the estate which he represents, for a certain sum, and to make the title to the purchaser named therein, through the medium of the orphans' court, is against public policy, and can not be enforced. *Myers v. Hodges*, 319.
3. COVENANT LIES ON A SPECIALTY exclusively, and not on a specialty modified or enlarged by simple contract. *Vicary v. Moore*, 323.
4. MODIFYING OR ALTERING a written contract by parol makes a new agreement, which is entirely parol. *Id.*

See BANKRUPTCY AND INSOLVENCY; FRAUD; USAGE.

#### CORPORATIONS.

1. CORPORATION HAS POWER TO MAKE A BY-LAW regulating the mode of calling meetings for the election of its officers, and if such by-law is reasonable, and not repugnant to the charter, nor to any law of the state, it is valid, and a meeting called in conformity thereto is a legal meeting. *Taylor v. Griswold*, 33.
2. PROXY, RIGHT OF VOTING BY.—The common law requires all votes to be given in person, and a by-law of a corporation which gives to its members the right to vote by proxy is repugnant to law, and therefore void, unless the charter of such corporation, either expressly or by legal implication, confers the power to make such a by-law. *Id.*
3. EACH STOCKHOLDER OF A CORPORATION HAS BUT ONE VOTE when the charter incorporates individuals by name, and gives to a majority of

them and their successors the joint powers of the corporation; hence a by-law of such corporation, which provides that each share of stock shall be entitled to a vote, is void. *Id.*

4. APPOINTMENT OF PERSONS TO PRESIDE AT AN ELECTION OF TRUSTEES of a church, who are not elders or church-wardens, is illegal, under 3 Rev. Stat. 292, unless there are no such officers present. *People v. Peck*, 104.
5. TERM "ELDERS" IN THIS STATUTE does not include preachers in the Baptist church, though commonly called elders. *Id.*
6. REGISTER OF THE MEMBERS is not the only evidence as to the number of qualified electors at elections under this statute, but parol proof is admissible, especially where it does not appear that a register is in existence. *Id.*
7. CERTIFICATE OF SUCH AN ELECTION, signed at any time afterwards, is admissible evidence, though another certificate has been given. *Id.*
8. STATUTE REQUIRING THE PRESIDING OFFICERS TO CERTIFY the result of the election immediately is directory. *Id.*
9. OMISSION TO GIVE NOTICE OF SUCH AN ELECTION, in all respects as required by statute, does not invalidate the election, if fairly conducted, and if all the members are present. *Id.*

See CONSTITUTIONAL LAW; FRANCHISES; MARSHALING ASSETS, 2; MUNICIPAL CORPORATIONS.

#### COSTS.

CHARGES FOR WITNESSES NOT EXAMINED ON THE TRIAL may be included in the bill of costs, notwithstanding the statute providing that the charges of not more than two witnesses to any one fact, shall be allowed, if the necessity of examining the witnesses was obviated only by admissions of the opposite party or by decisions of the trial court; and the party wishing to revise such bill of costs must show, in his bill of exceptions, that these circumstances did not exist. *Randolph v. Perry*, 659.

#### CO-TENANCY.

1. POSSESSION OF ONE JOINT TENANT, or tenant in common, is *prima facie* the possession of his co-tenant, and such possession can never be considered as adverse, unless attended with circumstances demonstrative of an adverse intent. *Lodge v. Patterson*, 335.
2. ACTUAL NOTICE IS NOT NECESSARY, however, before the possession of one joint tenant or tenant in common can be considered as adverse to his co-tenant. Circumstances from which such co-tenant can infer that it is adverse will be sufficient. *Id.*
3. ONE JOINT TENANT, OR TENANT IN COMMON, can not erect buildings or make improvements on the common property without the consent of his co-tenants, and then claim to hold the common property until reimbursed a proportion of the moneys expended. *Crest v. Jack*, 353.
4. IF A CO-TENANT OF A CHATTEL DESTROY IT, it is a conversion for which trespass or trover will lie. *Tubbs v. Richardson*, 570.
5. THE SALE OF LESS THAN THE WHOLE OF A CHATTEL by a tenant in common is not a conversion; whether the sale of the whole is, *quære*. *Id.*

See PARTITION.

## COVENANT.

**COVENANT MAY BE MAINTAINED** upon a contract in writing by which plaintiff agreed to do the brick-work on the defendant's warehouse, to recover the contract price for the work performed, although not done according to the contract; but the plaintiff's recovery will be limited to the price agreed upon, less a sum sufficient to compensate the defendant for the damages resulting from a failure to perform the work as agreed. *Ligget v. Smith*, 358.

See **CONTRACTS**, 3, 4.

## COVENANTS IN DEEDS.

1. **A COVENANT NOT TO ERECT A BUILDING ON THE GRANTOR'S LAND** in front of the tract conveyed runs with the land, and passes to an assignee without any separate assignment of the covenant. *Watertown v. Cowen*, 50.
2. **THE GRANTEE OF AN EASEMENT** is entitled to an injunction to restrain the erection of buildings on the servient tenement in violation of a covenant not to do so. *Id.*
3. **A REMOTE ASSIGNEE MAY SUE UPON A COVENANT** running with the land, whether or not he has taken from his immediate grantor with warranty. *Markland v. Crump*, 230.
4. **NO INTERMEDIATE GRANTOR**, though with warranty, can sue upon such covenant, unless he has previously made good to his grantee his damages suffered by the breach of the covenant. *Id.*
5. **MEASURE OF DAMAGES UPON COVENANT RUNNING WITH THE LAND.**—Where a grantee with warranty has recovered against his grantor, after eviction suffered, the latter may recover, upon a prior covenant of quiet enjoyment, the amount he has been obliged to pay his grantee. *Id.*
6. **RECOVERY ALLOWED UPON A COVENANT OF WARRANTY**, upon eviction, is the amount of purchase money paid, together with interest. *Id.*
7. **A COVENANT THAT THE GRANTEE SHALL KEEP AND MAINTAIN A PARTITION FENCE** between the lands conveyed and those of the grantor runs with the land. *Kellogg v. Robinson*, 550.
8. **A DECLARATION ON A BREACH** of a covenant against incumbrances is bad upon demurrer, when the incumbrance is created by an ancient deed with which the title of neither party to the action is connected. *Id.*

## CRIMINAL LAW.

1. **WHERE A STATUTE CREATES AN OFFENSE**, or changes the nature of one known at the common law, the indictment should be drawn in reference to the provisions of the statute and conclude *contra formam*; but if the statute is only declaratory of the common law, the indictment need not so conclude. *People v. Enoch*, 197.
2. **THE OBJECT OF THE REVISED STATUTES RELATIVE TO HOMICIDE** was not to create a new offense of murder, but to restore the ancient common law on the subject, and to distinguish between a felonious killing with malice aforethought, and a felonious killing without such malice. *Id.*
3. **A COMMON LAW INDICTMENT** for murder is proper under the revised statutes, but a conviction can not be had of a felonious homicide with malice aforethought, unless the evidence brings the case within the statutory definition. *Id.*



4. **WHEN THE EXECUTION OF A SENTENCE IS RESPITED** until a particular day, the sheriff must then execute the judgment, unless a further respite is granted, or the judgment has been reversed in the mean time; and a *habeas corpus* need not be sued out before the sentence can be executed. *Id.*
5. **UPON LAPSE OF DAY FIXED FOR EXECUTION OF SENTENCE OF DEATH**, without the sentence being carried into effect, a new day must be fixed for the execution. *State v. Kitchens*, 410.
6. **STATE HAS NO RIGHT OF APPEAL AFTER A VERDICT OF ACQUITTAL** on a criminal charge. *State v. Solomons*, 469.
7. **ADMISSION OF INCOMPETENT EVIDENCE WITHOUT OBJECTION** is no ground for reversing a judgment in a criminal case. *Per Catron, C. J. Peck, J., contra. Ervell v. State*, 480.
8. **WHERE THE VENUE IS NOT PROVED** in a criminal case as appears from the bill of exceptions setting out the whole evidence, the judgment against the prisoner must be reversed. *Id.*
9. **ONE INDICTED FOR HORSE-STEALING** can not plead as a defense to the charge, that the crime was committed, if at all, prior to a conviction against him for negro-stealing, for which he had received a pardon. *Hawkins v. State*, 641.
10. **NEITHER A CONVICTION NOR PARDON**, for a particular offense, can, in Alabama, operate as a bar, or discharge of any other distinct offense. *Id.*

See CONSPIRACY; HOMICIDE.

#### DAMAGES.

1. **STATEMENT OF DAMAGES, SUBMITTED WITH A VIEW TO A COMPROMISE**, does not preclude a purchaser of goods from recovering his actual damages from a breach of a warranty in the sale, where the compromise is not accepted. *Beebee v. Robert*, 132.
  2. **MEASURE OF DAMAGES UPON THE BREACH** of a contract not to use cotton presses for compressing cotton, is the injury sustained, and not the consideration paid for entering into such contract. *Terry v. Eslava*, 626.
  3. **AGGRAVATION OF DAMAGES FOR INJURIES TO PERSONAL PROPERTY**.—In an action on the case for an injury to personal property, the fraudulent and malicious motives of the defendant, in perpetrating the injury, may be taken into consideration in estimating the damages. *Merrills v. Tariff Manuf. Co.*, 682.
  4. **RULE OF DAMAGES IN TRESPASS AND CASE** is the same, in this respect. *Id.*
- See ASSAULT AND BATTERY, 1, 2; COMMON CARRIERS, 2; COVENANTS IN DEEDS, 5, 6.

#### DEBTOR AND CREDITOR.

See TENDER.

#### DEDICATION.

1. **DEDICATION OF LANDS FOR STREETS**.—When the owners of urban property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such a plat, they can not resume control over the property so as to deprive their grantees of the benefit of having such streets kept open. *Watertown v. Cowen*, 80.

2. THE SAME PRINCIPLE IS APPLICABLE to a dedication of lands to be used as an open square or public walk. *Id.*
3. WHERE ONE HAS DEDICATED LANDS FOR A PUBLIC SQUARE, no special covenant is necessary to authorize his grantees to insist upon the square being kept open. *Id.*
4. DEDICATION BY THE OWNER TO A PUBLIC USE, of lands which are used for the object contemplated by him, inures as a grant, and the existence of a grantee is not essential to its validity. *Brown v. Manning*, 255.
5. ACCEPTANCE OF SUCH LANDS, and their use by the public for the object intended, works as an estoppel *in pais*, precluding the donor and all claiming in his right from asserting any ownership inconsistent with such use. *Id.*
6. ACKNOWLEDGMENT AND RECORDING OF TOWN PLAT transfers the fee of land thereon dedicated to public use to the county, and secures its use to the purposes designated on the plat. *Id.*
7. AUTHORITY OF AGENT TO LAY OUT PLAT OF TOWN is proved by the ratification of the proprietors, evidenced by their laying out the streets and numbering the lots in accordance with the plat, and by their referring to it in their deeds as the "recorded town plat." *Id.*
8. INHABITANT OF A TOWN, LIVING AND HOLDING PROPERTY contiguous to a public square, may maintain a suit to declare the title to such square, and to have buildings erected thereon abated as nuisances. *Id.*
9. FOR A DEDICATION OF LANDS TO PUBLIC USE no particular form of words is necessary; it may be without deed. *State v. Trask*, 554.
10. THERE MUST BE A CLEAR INTENTION TO DEDICATE and an act of acceptance on the part of the public. *Id.*
11. LONG-CONTINUED USAGE IS EVIDENCE of the public right, but must be considered in connection with the intention of the owner to dedicate. *Id.*
12. A PART OF THE LAND DEDICATED MAY BE APPROPRIATED and the residue relinquished. *Id.*
13. THE QUESTION OF APPROPRIATION is for the jury. *Id.*
14. WHERE THE PUBLIC RELY UPON USAGE as evidence of the right, that right can not be more extensive than the usage. *Id.*
15. PARTS OF A DEED INCONSISTENT WITH THE MANIFEST INTENT will be rejected. *Id.*
16. EVEN WHERE THE PARTICULAR USE HAS CEASED, the public have acquired a right which can not be disregarded. Lands were dedicated for the erection of a court-house; relying on this dedication, dwellings were built, bordering on the lot, and the dedication was pronounced irrevocable; notwithstanding the state court was afterwards moved to another town. *Id.*

See MUNICIPAL CORPORATIONS, 6, 7.

#### DEEDS.

CONVEYANCE PROVED AND REGISTERED UNDER THE ACT OF 1715, though not founded on a valuable consideration, has the same effect as a deed of bargain and sale or feoffment would have had before that act. *Taul v. Campbell*, 508.

See EVIDENCE, 14; HUSBAND AND WIFE, 4; MORTGAGES, 1.

## DEPOSITION.

See EVIDENCE, 23.

## DEVISES.

See LEGACIES AND LEGATEES.

## DISCONTINUANCE.

See HUSBAND AND WIFE, 3.

## DIVORCE.

1. **CONDONATION OR RECRIMINATION**, to be taken advantage of in a suit for a divorce, should be urged by way of special plea, or insisted on in the answer as a defense. *Smith v. Smith*, 75.
2. **DEFENDANT IN A SUIT FOR A DIVORCE** may deny the adultery, and insist in the same answer that it has been condoned if committed; and may set up acts of adultery by the complainant in bar of the suit. *Id.*
3. **A DIVORCE WILL BE DENIED** where it appears that the injured party, with full knowledge, has forgiven the injury, where there has been no subsequent misconduct; or where it appears that the adultery was committed by the procurement or with the connivance of the complainant. *Id.*
4. **CONDONATION IS A CONDITIONAL FORGIVENESS**, and a repetition of the injury revives the condoned adultery. *Id.*
5. **THE ADULTERY OF THE HUSBAND** before or after the adultery of the wife is a conclusive bar to a suit for a divorce brought by him. The husband's adultery any time before the final decree will bar his suit for a divorce, and may be availed of by a supplemental answer. *Id.*

## DOWER.

1. **DOWAGER IS NOT BOUND TO NOTICE A DIVISION OF THE REVERSION** in the dower estate among the heirs. *Owen v. Hyde*, 467.
2. **DOWAGER IS NOT GUILTY OF WASTE IN CUTTING TIMBER** on one of the lots included in the dower estate, not necessary for her support, but for purposes of profit, if the whole dower estate does not receive lasting injury thereby, but sufficient timber remains for the permanent use of the estate, although part of the timber is used for fencing on another lot of the dower estate assigned to a different heir. *Id.*
3. **CLEARING OF TIMBER LAND FOR PURPOSES OF CULTIVATION**, on part of the dower estate, where the land already cleared is old and worn out, and enough timber is left for permanent use, is not waste in this country, though it might be otherwise in England. *Id.*

See LEGACIES AND LEGATEES, 10, 11.

## DURESS.

See ARREST, 1.

## EASEMENTS.

See COVENANTS IN DEEDS, 2.

## EJECTMENT.

1. **OUTSTANDING TITLE IS NO DEFENSE IN EJECTMENT**, to a *terre tenant* sued upon a sheriff's deed of his interest in the premises. *Avent v. Read*, 663. AM. DEC. VOL. XXVII—50

2. LANDLORD CAN NOT JOIN AS CO-DEFENDANT with his tenant sued upon such deed, for the reason that his interests can not be affected in the suit, as plaintiff recovering on such deed comes into the exact estate of defendant, and will, therefore, if defendant be a tenant, be after his recovery also tenant with the same rights and disabilities. *Id.*

See LICENSE, 6; PROBATE COURTS, 15, 19.

#### EMINENT DOMAIN.

1. RIGHT OF EACH NAVIGATOR OF A PUBLIC RIVER TO THE USE OF THE BANK, is subject to the sovereign power of eminent domain, by the exercise of which power any particular portion of the bank may be appropriated to exclusive use as a ferry or other landing, if the public good requires it. *Memphis v. Wright*, 489.
2. EMINENT DOMAIN, MUNICIPAL CORPORATION MAY EXERCISE, WHEN.—A municipal corporation having power by its charter “to do all things necessary to be done by corporations,” may appropriate a part of the bank of a public river within its limits, to exclusive use as a steamboat landing, and prohibit the landing of other water craft there. Thus, the city of Memphis, having such a clause in its charter, has power to condemn for use as a steamboat landing, any portion of the bank of the Mississippi river within its limits. *Id.*

#### EQUITY.

1. A COURT OF CHANCERY WILL NOT REFUSE TO TAKE JURISDICTION of a case merely on the ground that the complainant has a perfect remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection. *Bank of Utica v. Utica*, 72.
2. DISCOVERY NOT AN INDEPENDENT GROUND OF EQUITY JURISDICTION.—Equity will assist the jurisdiction of a court of law by requiring discovery in a proper case, but will not retain a bill seeking other relief, where the discovery sought is the only equity. *Kinloch v. Hamlin*, 441.
3. A BILL IN EQUITY WILL NOT LIE UPON ONE OF DEPENDENT COVENANTS in the absence of a showing by plaintiff of a performance, or of a valid excuse for the non-performance of the covenants incumbent upon himself. *Id.*
4. EQUITY CAN NOT SUBJECT STOCK HELD BY A JUDGMENT DEBTOR in an incorporated company to payment of the judgment, after the return of an execution unsatisfied at law. *Erwin v. Oldham*, 458.
5. WITHHOLDING A WRITTEN AGREEMENT BY ONE OF THE PARTIES, so that no copy can be obtained, and under such circumstances that an action at law can not, on account of such withholding, be properly prosecuted, entitles the other party to relief and accounting in equity. *Sturtevant v. Goode*, 586.
6. A BILL IN EQUITY MAY BE DISMISSED at any time during the pendency of the suit, for want of equity apparent upon its face. *Haughy v. Strang*, 648.
7. EQUITY WILL NOT RELIEVE AGAINST A JUDGMENT, for matter that might have been availed of as a defense, to the action in which the judgment was obtained. *Id.*
8. EQUITY WILL NOT GRANT RELIEF as to matters of which there is concur-

rent jurisdiction at law, if these matters have been already submitted to and passed upon by the latter forum. *Id.*

9. REMEDY OF A CREDITOR BY EXECUTION is not adequate, so as to prevent a resort to equity to subject to payment of the debt, property mortgaged to a surety for such debt for his indemnity, where the debtor's whole property is under mortgage, and it does not appear that the equity of redemption possesses any ascertainable value. *New London Bank v. Lee*, 713.
  10. WHERE THERE ARE MANY CREDITORS having an interest in a controversy, some may sue in a court of equity in behalf of themselves and the others. *Id.*
  11. COURT OF EQUITY WILL REQUIRE ALL PERSONS INTERESTED to be made parties to a proceeding affecting their interests; but although this is a general rule, it is subject to the discretion of the court. *Id.*
  12. OBJECTION OF A WANT OF PROPER PARTIES, after answer filed, and a report of the facts of the case by a committee, is unsustainable. *Id.*
  13. REMEDY AT LAW MUST BE CLEAR AND COMPLETE where the existence of such remedy is made an objection to a resort to equity. *Id.*
- See FRAUD 4; MARSHALING ASSETS; PLEADING AND PRACTICE; SPECIFIC PERFORMANCE.

#### ESCHEAT.

1. AN INQUISITION IN CASE OF ESCHATEAT, which fails to find that the decedent died intestate, and without heirs or any known kindred, is a nullity, and a transcript of such finding is not a lien on the lands of him in whose hands the estate is found to be. *Ramsey's appeal*, 301.
2. UNDER THE STATUTE OF VIRGINIA, 1 Rev. Code, c. 82, sec. 7, in a *monstrans de droit*, or petition of right to an inquisition of escheat, the monstrant is plaintiff. *French v. Commonwealth*, 613.
3. JUDGMENT OF AMOVEAS MANUS can not be rendered against the commonwealth in such proceeding, unless the monstrant show title in himself. *Id.*
4. STATUTE OF VIRGINIA, 1 Rev. Code, c. 86, sec. 40, declaring entries on lands that have been settled for thirty years prior to the entry or location, etc., invalid, and releasing the commonwealth's title thereto, has no application to escheated land. *Id.*

#### ESTOPPEL.

1. ADMISSION OF ANOTHER'S TITLE TO LAND, with an agreement to purchase from him, estops a party and his assignee from setting up a prior title in himself, where there has been no mistake or imposition. *Sayles v. Smith*, 117.
2. WHERE THE OWNER OF LAND STANDS BY and permits another to expend his money in improving it, he may, in equity, be compelled to surrender his title, on receiving compensation, or else to pay for the improvements, provided he has, by his conduct, encouraged the other to make the improvements, or has so conducted himself, while they were being placed upon the land, as to make it a fraud in him to take them without paying their value. *Crest v. Jack*, 353.
3. MERE SILENCE ON THE PART OF THE OWNER of land will not be sufficient in equity to relieve one who is perfectly acquainted with the rights, or

has the means of becoming so, and yet willfully insists on expending money in the improvement thereof. *Id.*

See LANDLORD AND TENANT.

### EVIDENCE.

1. THE REMOTE AND CONTINGENT INTEREST OF A CORPORATOR in a mere municipal corporation, is not sufficient to exclude him as a witness in behalf of the corporation. *Watertown v. Cowen*, 80.
2. DECLARATIONS OF PARTIES WHILE ENGAGED IN A COMBINATION to procure a fraudulent sale of a debtor's goods are admissible as part of the *res gestæ* to prove such combination, in an action by a defrauded creditor who had a bill of sale of the goods, against a purchaser at such sale. *Crary v. Sprague*, 110.
3. PARTY CALLING A WITNESS INTERESTED AGAINST HIM IS ESTOPPED from objecting to his competency and credibility, only so far as that trial is concerned. *Id.*
4. TESTIMONY OF AN INTERESTED WITNESS, SINCE DECEASED, can not be proved, in a second trial, by the party in whose favor he was interested, against the objection of the other party, though he was the latter's witness on the first trial. *Id.*
5. ADMISSION OF INCOMPETENT TESTIMONY is no ground for a new trial when the same facts were sufficiently proved by competent testimony. *Id.*
6. PERSON'S DECLARATIONS can not be proved by a party who can call him as a witness. *Bristol v. Dann*, 122.
7. DECLARATIONS OF A PAYEE WHO HAS GUARANTEED THE NOTE are not admissible in favor of the makers in an action by a subsequent holder. *Id.*
8. PROOF OF THE VOLUNTARY DESTRUCTION OF A NOTE BY THE PAYEE, without any explanation of the act, consistent with an honest or justifiable purpose, is insufficient to let in secondary evidence of its contents. *Blade v. Noland*, 126.
9. PLAINTIFF IS A COMPETENT WITNESS TO PROVE THE LOSS of a note, but not where he has designedly destroyed it. *Id.*
10. WHERE PART OF A WITNESS' TESTIMONY IS COMPETENT, an objection to the whole of it is too broad, and must be disallowed. *Beebe v. Bull*, 150.
11. ENTRIES OF THE SALE OF GOODS in a book of original entry made at the time of sale, but before delivery, are not competent evidence to prove a delivery of such goods. *Rhoads v. Gaul*, 277.
12. SUCH ENTRIES, TO BE EVIDENCE OF DELIVERY, should be made at the time the goods are delivered, or immediately afterwards. *Id.*
13. ARBITRARY SIGNS OR MARKS affixed to the entry of each article in a book of original entry, for the purpose of indicating that it has been delivered, and to prevent a second delivery of similar articles, are not evidence of a delivery, it not appearing by whom they were affixed. *Id.*
14. PAROL EVIDENCE IS INADMISSIBLE to show that a deed, which by its terms conveys certain real estate to two persons as tenants in common, was intended to convey it to them as partners, and that it is partnership property. *Hale v. Henrie*, 289.
15. ENTRIES MADE IN A BOOK OF ORIGINAL ENTRIES from memoranda made on loose scraps of paper at the time the transactions occurred; and which have been carried in the pocket for several days, are not evidence to charge a party. *Vicary v. Moore*, 323.

16. A PERSON IN WHOM AN OUTSTANDING TITLE to the land in controversy is alleged to exist is not a competent witness for the defendant in an action of ejectment. *Lodge v. Patterson*, 335.
17. EVIDENCE OF WHAT A DECEASED WITNESS testified upon a former trial, is admissible upon a second trial of the case. *State v. De Witt*, 371.
18. THE NOTES OF THE PRESIDING JUDGE in relation to what such witness said, are not *per se* evidence. *Id.*
19. THE WIFE IS A COMPETENT WITNESS AGAINST THE HUSBAND, on his trial for a personal outrage committed by him upon her. *State v. Boyd*, 376.
20. DECLARATIONS OF PLAINTIFF'S ANCESTOR, upon various occasions, running through the whole period of the possession of defendant's predecessor, introduced by defendant for the purpose of showing the character of that possession, will render admissible in plaintiff's favor the declarations of the same person made during the same period, explanatory of the possession, though not made at the very times at which the declarations relied upon by defendant were spoken. *Sumner v. Murphy*, 397.
21. RECORD OF A SUIT FOR THE RECOVERY OF LAND can not be evidence in an action against the defendant for the recovery of rent of the premises, and therefore one interested in the event of the latter suit is yet competent to testify in the former. *Id.*
22. THE DECLARATIONS OF ONE OF SEVERAL JOINT COVENANTORS, relative to the matter of covenant, are evidence against the others. *Costello v. Cave*, 404.
23. THE DEPOSITION OF A DECEASED PERSON, taken in the absence of the defendant in a criminal action, is inadmissible. *State v. Hill*, 406.
24. A DEATH-BED DECLARATION, contained in the form of a deposition taken before the deceased was conscious of his approaching end, is good, if after he was conscious of his state, and very shortly before his death, the deposition was reaffirmed by him, after having heard it read over. *State v. Ferguson*, 412.
25. DECLARATIONS OF ONE OF SEVERAL IN COMMUNITY OF INTEREST OR DESIGN, relative to the subject-matter whereof the community exists, are admissible in evidence against the others; therefore, where a combination to defeat creditors by fraudulent transfer exists, declarations of the grantor subsequent to the transfer are admissible against his grantees. *Bell v. Coitel*, 448.
26. THE WIFE IS A COMPETENT WITNESS wherever the husband would be. *Id.*
27. REPUTATION IS SUFFICIENT EVIDENCE OF RELATIONSHIP between the parties on an indictment for incest. *Ewell v. State*, 480.
28. BURDEN OF PROOF RESTS UPON THE DEFENDANT in an action of slander, where he is charged with saying that an affidavit made by plaintiff was false, and to which he pleads justification, to show that the affidavit was untrue, and not upon the plaintiff to show that it was true. *Hinchman v. Lawson*, 622.
29. THE RECORD OF THE JUDGMENT OF A COURT OF A SISTER STATE, is attested in sufficient compliance with the requirements of the act of congress regulating the authentication of records, where the certificate of the presiding judge is to the effect that the clerk attesting is the clerk of the court at the time of his, the judge's certificate, without further

stating that he was clerk at the date of attestation. *Merrisether v. Garvin*, 650.

30. RECORD OF A DEED NOT RECORDED WITHIN A YEAR AFTER ITS EXECUTION is admissible under the former act of assembly of Delaware. *Roach v. Martin*, 746.

See AGENCY, 4, 5; COMMON CARRIERS, 10, 11; JURISDICTION, 1; USAGE.

### EXECUTIONS.

1. ACTUAL POSSESSION OF LAND MAY BE DELIVERED to a person by the sheriff under a writ of possession, although the land was, at the time of the delivery, covered with water. *Perrine v. Bergen*, 63.
2. BONA FIDE PURCHASER FOR VALUE, AFTER A LEVY of an execution, takes the title subject thereto. *Butler v. Maynard*, 100.
3. LEAVING THE PROPERTY IN THE DEFENDANT'S POSSESSION for a reasonable time, after a levy, without improper motive, is not *per se* fraudulent; but it is otherwise where there is unreasonable delay. *Id.*
4. OMITTING TO PROCLAIM A LEVY, at the time, though by direction of the plaintiff, is not *per se* fraudulent, so as to impair the effect of the levy as against a *bona fide* purchaser. *Id.*
5. FRAUDULENT EXECUTION SALE, PROCURED BY A COMBINATION between the debtors and others to defeat the claim of a lien creditor, is void as to him, where the purchaser has notice of his claim. *Crary v. Sprague*, 110.
6. EXECUTION SALE OF PROPERTY FOR A GROSSLY INADEQUATE PRICE is a strong circumstance to show fraud. *Id.*
7. UNSIGNED INDORSEMENT BY A JUSTICE, RENEWING AN EXECUTION, is void, and the process being thereby defective on its face, will not protect the officer who executes it. *Barhydt v. Valk*, 124.
8. FRAUD IN A PURCHASE AT EXECUTION SALE can not be taken advantage of by strangers to the execution. *Den v. Graham*, 226.
9. A FIERI FACIAS ISSUED AND LEVIED UPON THE DEBTOR'S PROPERTY, with instructions to stay further proceedings for the present, the object being merely to secure the payment of the judgment, will be postponed to a *fi. fa.* subsequently issued on another judgment against the same debtor which has been regularly acted upon. *Hickman v. Caldwell*, 274.
10. SHERIFF'S DEED IS CONCLUSIVE EVIDENCE of the right of possession in the purchaser against the defendant in execution and all claiming under him after the judgment. *Hale v. Henrie*, 289.
11. MATTERS OF DEFENSE accruing subsequent to a judgment, and prior to a sale thereunder, such as payment, satisfaction, and the like, should be taken advantage of by motion to stay proceedings or to set aside the process. They can not be set up to defeat a purchaser's right of possession, acquired by virtue of a sheriff's deed, made in pursuance of a sale under such judgment. *Id.*
12. WHEN THE SUMMARY PROCEEDING given by the act of April 6, 1802, is resorted to for the purpose of obtaining possession of land sold at sheriff's sale, a person who claims the land by title paramount to the judgment under which the sale has been had, may, on making the affidavit and entering into the recognizance required, stay such proceedings, and have his title tried in the court of common pleas. *Id.*



13. UPON SUCH TRIAL THE ONLY MATTER IN ISSUE is the title averred by the defendant in his affidavit, and he will not be permitted to show that the judgment on which the land was sold had been paid prior to the sale, although the purchaser who seeks to recover possession of the land was the plaintiff in that judgment. *Id.*
14. OMISSION OF ANY MATERIAL PART of an inquisition may be corrected by parol. *Id.*
15. AN AGREEMENT BY THE PLAINTIFF to a temporary stay of execution, in consideration of the defendant confessing judgment, will not exonerate the special bail in the action. *Johnson v. Boyer*, 363.
16. A STATUTE AUTHORIZING SHERIFFS TO MAKE DEEDS, in pursuance of the levy and sale made by their predecessor, if the latter "is dead, resigned, or removed from office," extends to a removal from office brought about by the expiration of the incumbent's term of office. *Martin v. Wilbourne*, 393.
17. A MISRECEIPTAL IN A SHERIFF'S DEED, of the facts authorizing his conveyance, will not avoid the deed, if the necessary facts actually exist. *Id.*
18. CAVEAT EMPTOR APPLIES TO EXECUTION SALES, and bars a purchaser at such sale, who has suffered a recovery of the property bought, by title paramount, from recourse against the plaintiff in execution. *Murphy v. Higginbottom*, 395.
19. A BOND OF INDEMNITY TO THE SHERIFF, to protect him from the consequences of a sale under execution, has no effect beyond the parties to the bond, and will give a purchaser who has suffered a recovery of the property bought at the sale no additional right of action. *Id.*
20. DESCRIPTION OF LAND IN A RETURN OF A LEVY OF EXECUTION, is sufficiently certain, where it states the levy to have been made on the right, title, etc., of the judgment debtor, "in and to seventy acres of land lying on the west fork of Stone's river," since it may be made certain. *Swan v. Parker*, 522.
21. PAROL EVIDENCE TO SHOW THAT THE LAND SOLD under the execution, in such a case, was the only land owned by the debtor in the locality specified in the return, is admissible. *Id.*
22. LOCALITY AND BOUNDARY ARE QUESTIONS FOR THE JURY in an action of ejectment brought by the purchaser in such a case. *Id.*
23. DECREE FOR MONEY under the act of 1787, c. 22, sec. 2, has the same force as a judgment at law. *Battle v. Bering*, 528.
24. STATUTE OF FRAUDS of 29 Car. II., relating to the lien of executions on personalty, is not in force in Tennessee. *Id.*
25. GOODS OF A DEBTOR ARE BOUND BY A DECREE AWARDED EXECUTION, from the rendition thereof, as against a subsequent purchaser from the debtor before the execution is actually issued. *Id.*
26. WHERE AN EXECUTION FOR THE COLLECTION OF A MILITARY FINE recites that it was imposed by C. S., captain, and was signed C. S., jun., captain, it will be a justification to the person acting under it. *Brainard v. Stilphin*, 532.

See SCHOOLS; SUNDAY, 1; SURETYSHIP, 6.

#### EXECUTORS AND ADMINISTRATORS.

1. FUNDS HELD BY AN ADMINISTRATOR, WHO IS ALSO GUARDIAN of the party entitled thereto, upon a distribution, after the time has expired in which

to settle the estate, are presumed to be in his hands as guardian, and the sureties on his administration bond are not liable therefor. *Carroll v. Bosley*, 460.

2. IF THE ADMINISTRATOR, IN SUCH A CASE, HAS WASTED THE ESTATE before the expiration of the time for settlement, that fact must be averred. *Id.*
  3. AN EXECUTOR CAN NOT MAKE CONTRACTS, IN HIS REPRESENTATIVE CHARACTER, that will bind the estate. *McEldery v. McKenzie*, 643.
  4. EXECUTOR IS PERSONALLY LIABLE ON CONTRACTS made by him concerning the necessary matters, relating to the estate which he represents. *Id.*
  5. THE REPRESENTATIVES OF A DECEASED ADMINISTRATOR ARE RESPONSIBLE for the assets of the first estate, converted by their decedent, during his administration, to those persons only to whom the deceased was during his life liable. *Chamberlain v. Bates*, 667.
  6. THE AUTHORITY OF AN ADMINISTRATOR DE BONIS NON extends only to such personalty of the first decedent as remains unaltered or unconverted by his predecessor; therefore an action will not lie by such administrator, against the representatives of his predecessor, to recover the amount of converted assets of the estate in their hands. *Id.*
- See LEGACIES AND LEGATEES, 4; PROBATE COURTS, 9, 10, 11, 12, 13; SET-OFF, 5.

#### FALSE IMPRISONMENT.

IN TRESPASS FOR FALSE IMPRISONMENT AGAINST A CONSTABLE for taking the plaintiff's body in execution, when he possessed sufficient property subject to the writ, the burden is on the plaintiff to show that fact, and that he disclosed it to the officer. *Barhydt v. Valk*, 124.

#### FEEES.

See ACTIONS.

#### FEMES-COVERT.

See HUSBAND AND WIFE; MARRIED WOMEN.

#### FERRIES.

See FRANCHISE.

#### FORBEARANCE.

1. PROMISE TO FORBEAR IN GENERAL, without adding any particular time, is to be understood a total forbearance. *Clark v. Russel*, 348.
2. PROMISE TO PAY THE DEBT OF ANOTHER, in consideration of a general forbearance, can not be enforced, if the original debtor is subsequently sued. *Id.*

#### FRANCHISES.

1. A GRANT OF A FERRY FRANCHISE, to meet public convenience, is not an exclusive grant, that will, on account of the prohibition against impairing the obligation of contracts, preclude the legislature from granting a bridge franchise, detracting from its value. *Dyer v. Tuscaloosa Bridge Co.*, 655.
2. WHERE A FRANCHISE HAS BEEN GRANTED SOLELY FOR PUBLIC CONVENIENCE, there can be no demand for its depreciation in value, from the subsequent grant of a similar franchise. *Id.*

FRAUD.

- 1 **RELATIVE CIRCUMSTANCES AND CONDITION OF PARTIES** to an alleged fraudulent contract should be considered in determining the question of fraud; as where one of the parties is an artful, shrewd business man, and the other an aged, ignorant, imbecile negro woman, and the contract is secretly made, and its terms not fully explained. *King v. Cohorn*, 455.
- 2 **CHARACTER AND SUBJECT OF THE BARGAIN**, as being such as no sane person would make, and no honest man would accept, may also furnish strong evidence of fraud; as, where an ignorant old negro woman was induced to sell a lot constituting her home, and her only property, for a wagon and part of a team, for which she had no use, and there were circumstances indicating that she thought she was buying the liberty of her husband, who was a slave. *Id.*
- 3 **RELEASE OF MORTGAGE PROCURED BY FRAUD AND MISREPRESENTATION** will be vacated in equity, the mortgage lien restored, and the property decreed to be sold for the payment of the mortgagee. *Poore v. Price*, 583.
- 4 **FRAUD, CONCURRENT JURISDICTION IN CASES OF, EXISTS AT LAW AND IN EQUITY**, and the latter will not refuse to act, merely because there is also a remedy at the former. *Id.*

See EXECUTIONS, 5, 8.

GRAND JURY.

See INDICTMENTS.

GRANTS.

1. **THE MORE CERTAIN OF TWO INCONSISTENT DESCRIPTIONS** of the boundary lines of a grant of land must be adopted. *Den v. Graham*, 226.
2. **COURSE AND DISTANCE** will prevail in determining the terminus of a line over the further description of this point as being "near" to a given object. *Id.*
3. **THE POINTS OF INTERSECTION OF THE LINES OF A GRANT** must be determined by survey of the lines in the order of their description in the grant, wherever the calls of the lines are of equal certainty; but if the description of the posterior line be more certain, or if, from surrounding circumstances, there be reason to believe that its description is the more accurate, then the point of intersection with the previous line may be determined by running such line reversed. *Id.*
4. **A PRE-EMPTIONER'S POWER OF ATTORNEY TO CONVEY LAND**, held under the pre-emption law of May, 1830, as soon as patent has issued therefor, is void as an attempted evasion of the inhibition of the act against the transfer of pre-emption rights before patent issued; therefore conveyance under the power, though after patent issued, passes no title. *McElyea v. Hayter*, 645.

GUARDIAN AND WARD.

See TRUSTS AND TRUSTEES.

HABEAS CORPUS.

1. **CUSTODY OF A CHILD BROUGHT UP ON HABEAS CORPUS** will not be ordered delivered to the legal guardian. The purpose of the writ is answered by informing the child that it is at liberty to go where it pleases. *In the Matter of Kottman*, 390.

2. *IDEM*—BUT IF THE CHILD BE OF TOO TENDER AN AGE to exercise a power of choice, then the custody will be ordered so delivered. *Id.*
3. THE RETURN OF SUCH CHILD may be protected, at the discretion of the court, if there be reason to fear that the parent or guardian will attempt to take possession or control of the child for an improper purpose. *Id.*

#### HOMICIDE.

1. MANSLAUGHTER is the killing of a human being, under the influence of sudden heat and passion, brought on by a reasonable provocation. *State v. Ferguson*, 412.
2. IT IS MURDER to kill a person, the only provocation being that he has, without using unnecessary violence, separated the prisoner from a person whom he was beating. *Id.*

See CRIMINAL LAW, 2, 3.

#### HUSBAND AND WIFE.

1. A FEME-COVERT CAN MAKE NO VALID AGREEMENT with her husband to live separate from him, except under the sanction of the court, and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. *Rogers v. Rogers*, 84.
2. VOLUNTARY AGREEMENTS FOR SEPARATION between husband and wife are not authorized by the law; it merely tolerates such agreements when made in such a manner that they can be enforced by or against a third person acting in behalf of the wife. *Id.*
3. A PAROL AGREEMENT BY A FEME-COVERT TO DISCONTINUE A SUIT for separation is inoperative. *Id.*
4. CONVEYANCE TO A HUSBAND AND WIFE in fee vests in them an indivisible estate, which, after the death of one, continues solely in the survivor, and no part thereof descends to the heirs of the one first dying. *Towl v. Campbell*, 508.

See DIVORCE; EVIDENCE, 19, 26.

#### ILLEGAL CONTRACTS.

See CONTRACTS.

#### ILLEGITIMACY.

See SUCCESSION.

#### IMPROVEMENTS.

1. IMPROVEMENTS PLACED BY A STRANGER upon the land of another, become the latter's property. *Crest v. Jack*, 353.
2. FOUNDATION OF PROPERTY consists in its being an exclusive right, and persons other than the owner can not impose burdens on it, or impair its enjoyment without the latter's permission, or by color of legal authority. *Id.*

#### INDICTMENT.

AN INDICTMENT WILL NOT BE QUASHED because of the character of the evidence which has influenced the grand jury in finding it. *State v. Boyd*, 376.

See CRIMINAL LAW, 1, 3; MUNICIPAL CORPORATIONS.

## INJUNCTIONS.

**INJUNCTION LIES TO PREVENT WASTE UPON ATTACHED REALTY** by an insolvent debtor, at the suit of the attaching creditor. *Camp v. Bates*, 707.

See COVENANTS IN DEEDS, 2.

## INSOLVENCY.

See BANKRUPTCY.

## JUDGMENTS.

1. **THE AMOUNT PAID FOR A RELEASE** of a judgment lien will be credited as a payment on the judgment, though paid by a stranger, and though the property released was not covered by the lien. *Stoney v. Shultz*, 429.
  2. **LOTS SOLD WHILE COVERED BY THE LIEN** of a judgment against the vendor, or of a mortgage given by him, are in the hands of the vendee, liable to the discharge of the liens in the inverse order of their purchases; the last sold first liable, etc. *Id.*
  3. **A DECREE FOR THE SALE ON CREDIT OF MORTGAGED PREMISES** does not violate the obligation of contracts. *Id.*
  4. **WHERE A JUDGMENT DEBTOR FURNISHES MONEY** to a third person to buy up the judgment, and he does so, the creditor not knowing the facts, it amounts to a part payment only. *Shaw v. Clark*, 578.
  5. **DECREE OF THE ORPHANS' COURT** as to every point necessary to be decided upon, is conclusive. *Roach v. Martin*, 746.
  6. **THE JUDGMENT OF A COURT OF COMPETENT JURISDICTION**, but proceeding erroneously, is valid until reversed. *Id.*
  7. **A JUDGMENT, SENTENCE, OR DECREE OF AN ORPHANS' COURT** CAN NOT BE IMPEACHED on the ground that the will was forged, or that the testator was *non compos mentis*, or that another was executor. *Id.*
  8. **AN ORDER DIRECTING THE SALE OF REAL ESTATE** can not be impeached in an action of ejectment brought by the purchaser at the sale. *Id.*
- See EQUITY 7; PROBATE COURTS, 1, 2, 6, 8, 12, 17, 18, 19; RES ADJUDICATA; SET-OFF, 1, 3.

## JUDICIAL NOTICE.

See JURISDICTION, 1.

## JURISDICTION.

1. **COURT TAKES JUDICIAL NOTICE OF STATUTES CONFERRING JURISDICTION** on justices of the peace in certain actions. *Stiles v. Stewart*, 142.
  2. **AVERMENT OF JURISDICTION IN SUING ON A JUSTICE'S JUDGMENT** recovered in New York, or of the steps by which he acquired jurisdiction, is unnecessary, where the amount, date, and place of the recovery, and the justice's name and office, are alleged. *Id.*
- See EQUITY; FRAUD.

## JURY.

- A. **MASTER MASON IS NOT INCOMPETENT TO SIT AS A JUROR** in an action of slander wherein one of the parties belongs to the fraternity of free masons, and the other does not. *Purple v. Horton*, 167.

## LANDLORD AND TENANT.

1. A LESSOR OF PREMISES WHICH ARE BURNED has no relief, either at law or in equity, against an express covenant to pay the rent, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to rebuild. *Gates v. Green*, 68.
2. REFORMING LEASE.—Where, on a release of the premises, the lessor engages by parol to insert in the lease a provision that the rent should cease if the premises were casually burned, which provision is inadvertently omitted, an injunction will lie on behalf of the lessee to restrain the lessor from proceeding at law to recover the rent subsequent to the burning of the premises. *Id.*
3. TENANT IN POSSESSION UNDER A PAROL LEASE FOR TWO YEARS, which is void by the statute of frauds, is a tenant at will, or from year to year. *Duke v. Harper*, 462.
4. TENANT IS ESTOPPED FROM DISCLAIMING his landlord's title during the term. *Id.*
5. TENANT'S DISCLAIMER OF HIS LANDLORD'S TITLE during the term, and claiming to hold for himself or another, works a forfeiture of his lease, and the landlord, at his election, may treat him as a trespasser, and eject him without a notice to quit, or continue to treat him as his tenant. *Id.*
6. ACTUAL OUSTER OF THE LESSOR BY HIS TENANT creates an adverse holding by the latter, upon which the statute of limitations will run. *Id.*
7. ACTUAL OUSTER MAY BE INFERRED FROM CIRCUMSTANCES which are matters of evidence for the jury. *Id.*
8. NOTICE TO THE LESSOR THAT THE TENANT DISCLAIMS HIS TITLE, and claims for himself or another, is necessary before the statute will begin to run, where the length of time does not furnish evidence of ouster. *Id.*
9. REFUSAL TO PAY RENT TO THE LESSOR'S AGENT, and a disavowal of the lessor's title, will not set the statute in motion until the lessor has knowledge of that fact, unless the agent is authorized to enter upon or sue for the land in the lessor's name. *Id.*

See AGENCY, 6, 7, 8; EJECTMENT, 2; PARTNERSHIP, 5.

## LEASES.

See LANDLORD AND TENANT.

## LEGACIES AND LEGATEES.

1. DEVISE AND LEGACY TO "HEIRS" OF DIFFERENT PERSONS must be divided among the persons answering the class description *per capita*, not *per stirpes*, where the word "heirs" is used in the will as one of description and purchase. *Ward v. Stow*, 238.
2. THE WORD "HEIRS" IS A WORD OF PURCHASE wherever a devise of an estate to "heirs" is not preceded by any prior estate of freehold devised to their ancestors, which may be expanded into an estate of inheritance by the estate left the "heirs." *Id.*
3. THE INTERPRETATION OF A TECHNICAL TERM is established by reference to the science or art to which it is peculiar. *Id.*
4. AN EXECUTOR CAN NOT COMPEL LEGATEES TO REFUND the value of legacies delivered to them because the assets of the estate have proved insufficient to discharge its liabilities, unless he show in addition that the

- deficiency was caused by debts of which there was no notice at the time that the legacies were delivered, or by subsequent depreciation of the assets retained from unforeseen casualty. *Marsh v. Scarboro*, 243.
5. **TESTATOR'S INTENTION IS GENERALLY NOT TAKEN** into account in determining the existence of a specific legacy at the time of his death. *Blackstone v. Blackstone*, 359.
  6. **A LEGACY, BY WHICH A TESTATOR BEQUEATHED** "all my two hundred and fifty shares of capital stock which I hold in the Union bank of Pennsylvania," etc., is specific, and becomes extinguished by a sale of the stock in the testator's life-time. *Id.*
  7. **A LEGACY PROPERLY SPECIFIC**, and not merely specific in its nature by being charged on a specific fund, is adeemed by any change of its state or form, effected by the act of the testator, which makes the *corpus* of the legacy at his death different from what it was when the will was made. Where the change in the thing bequeathed is effected by fraud or by operation of law, it will not be adeemed. *Id.*
  8. **A DEVISE BY WHICH A TESTATOR DEVISES TO HIS WIFE** certain real property, describing it, together with certain personal property, and also, "with whatsoever is not named that I have any right or claim to, either in law or equity," vests in her, not only a life estate, but the reversion in fee to said real property. *Harper v. Blean*, 367.
  9. **THE LAST OF TWO INCONSISTENT DEVISES** or legacies of the same will, takes effect to the exclusion of the first. *Fraser v. Boone*, 422.
  10. **LEGACY TO WIFE IS NOT REGARDED IN LIEU OF DOWER** in the absence of express provision, where the real estate subject to the dower is devised to trustees to sell, or with directions that the executors sell, in order to pay debts. *Gordon v. Stevens*, 445.
  11. **IDEM.**—The wife is not required to elect between her right to dower and a legacy under her husband's will, unless the intent that she exercise such choice, appear from express provisions in the will, or by a necessary implication from its terms. *Id.*
  12. **BEQUEST OF PERSONALTY TO A WOMAN AND THE "HEIRS OF HER BODY lawfully begotten"** vests the entire interest in the first taker. *Duncan v. Martin*, 525.
  13. **A DEVISE TO ONE AND HIS HEIRS WITH A REMAINDER LIMITED OVER**, if the devisee dies without issue or heirs of the body, is a fee tail. *Roach v. Martin*, 746.
  14. **THE WORD "HEIR" OR "HEIRS" IS NOMEN COLLECTIVUM**, not a word of purchase, and carries the land not only to the immediate heir, but to all those who descend from that devisee. *Id.*
  15. **A DEVISE TO ONE AND HER HEIRS FOREVER**, "except she should die without an heir born of her own body," then to B., creates an estate tail with a remainder over. *Id.*
  16. **IF A DEVISE CAN TAKE EFFECT AS A REMAINDER**, it shall never be construed an executory devise. *Id.*
  17. **PERSONAL PROPERTY BEQUEATHED TO ONE AND THE HEIRS OF HIS BODY**, passes to the person absolutely, otherwise in the case of realty. *Id.*

See WILLS.

#### LIBEL.

1. **PRIVILEGED COMMUNICATION.**—An action for libel will not lie, without

proof of express malice, for presenting to a board of excise, a remonstrance against granting the plaintiff a tavern license, charging him with being a professional pettifogger, and stirring up suits, and endeavoring to have justices' courts appointed at his tavern, such a communication being privileged. *Vanderzee v. McGregor*, 156.

2. PRESENTING SUCH REMONSTRANCE TO OTHERS FOR SIGNATURES, without proof of express malice, is not actionable. *Id.*
3. LIBEL, WHAT WORDS CONSTITUTE.—To print and publish of one that he has infringed another's patent for bark mills, is a libel; for such publication tends to injure his business and reputation, and to expose him to hatred and contempt. *Watson v. Trask*, 271.
4. WORDS WRITTEN AND PUBLISHED MAY BE LIBELOUS, which if spoken would not be actionable. *Colby v. Reynolds*, 574.
5. A PUBLICATION RENDERING A PERSON RIDICULOUS, or exposing him to contempt, or impairing his standing in society, as a man of rectitude and principle, is libelous. *Id.*
6. TO CHARGE ONE IN WRITING WITH BEING THE AUTHOR of a false and malicious report, is libelous. *Id.*

#### LICENSE.

1. LICENSE EXECUTED IS GENERALLY IRREVOCABLE, but not where some other principle of law is to be violated by such a construction. *Priace v. Case*, 675.
2. LICENSE TO ERECT AND MAINTAIN A HOUSE or other structure on one's land, though executed, is not irrevocable, because such a construction would be in effect a violation of the statute of frauds. *Id.*
3. PURCHASER OF LAND WITHOUT NOTICE OF A LICENSE given to another to erect and use a house thereon, is not bound thereby, though the license has been executed. *Id.*
4. LICENSEE'S POSSESSION OF THE HOUSE IS NOT NOTICE to the purchaser in such a case. *Id.*
5. LICENSE MERELY PERSONAL, WHEN.—A license to another to erect a house for his use on the licensor's land is a mere personal privilege, and expires with the death of the licensee. *Id.*
6. RECOVERY IN EJECTMENT BY A PURCHASER IS NOTICE to the heirs or assigns of the deceased licensee to remove the building. *Id.*
7. FAILURE TO REMOVE THE BUILDING FOR MORE THAN A YEAR after such recovery entitles the purchaser of the land to remove it himself. *Id.*
8. BUILDING MAY BE TAKEN TO PIECES by such purchaser, in order to remove it, without his being liable in damages, if no wanton or unnecessary injury is done, and if the owner of the building has provided no place for it. *Id.*

#### LIENS.

1. MECHANICS, TO PRESERVE THEIR LIEN for work performed, must file their claim within six months from the completion of the building. *Ramsey's Appeal*, 301.
2. VENDOR'S LIEN FOR THE UNPAID PURCHASE MONEY of land which he has given a bond to convey, overreaches the lien of any subsequent judgment creditor of, or purchaser from the vendee. *Gillespie v. Bradford*, 494.



2. **MECHANIC'S LIEN UNDER THE STATUTES OF 1825**, for improvements erected on land, under a contract with a purchaser holding a bond for a conveyance, is subordinate to the vendor's lien for the unpaid purchase money. *Id.*

See **VENDOR AND VENDEE**, 3, 4.

#### MAINTENANCE.

**STATUTE PROHIBITING ADVANCES BY ATTORNEYS** on notes left with them for collection does not apply to advances made to assist a needy client in supporting his family, long after the suit was commenced, and after one trial has been had. *Bristol v. Dann*, 122.

#### MANDAMUS.

1. **MANDAMUS TO COMPEL COMMON COUNCIL TO CORRECT** an assessment and taxation when illegal, will lie where the city charter gives to the common council the exclusive control as to assessing and collecting the city taxes. *Bank of Utica v. Utica*, 72.
2. **PRACTICE ON MANDAMUS** is, in this state, according to the usages and principles of the common law, and no pleadings are allowed to contradict collaterally the return to the writ. *Universalist Church v. Trustees*, 287.
3. **RETURN, WHAT SUFFICIENT.**—A return to a writ of mandamus, issued to trustees of ministerial lands to compel them to distribute to the relators their proportion of the funds accruing from such lands, which states that all of such funds were previously distributed by them to the parties who applied therefor, is sufficient. *Id.*

#### MANSLAUGHTER.

See **HOMICIDE**.

#### MARRIAGE.

See **DIVORCE**.

#### MARRIED WOMEN.

See **HUSBAND AND WIFE**.

#### MARSHALING OF ASSETS.

1. **A CREDITOR WHO MAY AT LAW CONTROL** the application of two or more funds will not be permitted in equity to use his legal advantage so as to exclude the demand of a fellow-creditor whose legal recourse is to but one of them. *Ramsey's Appeal*, 301.
2. **A CORPORATION IS ENTITLED TO HAVE A JUDGMENT** in its favor against one of its stockholders satisfied out of the proceeds of a sale of his real estate; and other judgment creditors who are thus deprived of the payment of their judgments are entitled to be subrogated to the rights of the corporation, so as to enable them to levy and sell the corporate stock of their debtor. *Id.*

#### MASONS.

See **JURORS**.

#### MECHANICS' LIENS.

See **LIENS**.

## MILITARY LAW.

See PROCESS.

## MISTAKE.

See ASSUMPSIT, 2.

## MORTGAGES.

1. **ABSOLUTE DEED WITH A COVENANT** by the grantee, that he is to reconvey upon the repayment of a certain sum and interest within a year, the grantor remaining in possession, constitutes a mortgage, and will be so construed, although it appears by parol that the parties did not so intend it. *Cohwell v. Woods*, 345.
2. **A MORTGAGEE, AFTER CONDITION BROKEN**, both at common law and under our statute, after notice to the tenants in possession, may demand of and collect from them their accruing and past due rents. *Stoney v. Shultz*, 429.
3. **A SHERIFF IS THE PRIVATE AGENT** of the mortgagee, and passes, by his sale, the estate of the latter in the land, though professedly the sale is by virtue of the proceedings in a foreclosure suit, if this assumed authority is insufficient, and if the sheriff has acted in bringing on the sale at the instance of the mortgagee. *Id.*
4. **THE MORTGAGEE, AFTER CONDITION BROKEN, IS ENTITLED ONLY TO THE GROUND RENTS**, and not to the enhanced value of rents caused by the improvements put upon the land by the persons in possession from whom the mortgagee seeks a recovery. *Id.*
5. **AN EQUITY OF REDEMPTION** is only available in chancery, yet in the case of a mortgaged chattel, where the debt has been paid, the legal title is perfect in the mortgagor, and may be asserted at law, notwithstanding the mortgagee may have in his possession a bill of sale of the property. *Harrison v. Hicks*, 638.

See FRAUD, 3; JUDGMENTS, 2, 3; SURETYSHIP, 5.

## MUNICIPAL CORPORATIONS.

1. **A MUNICIPAL CORPORATION IS THE PROPER REPRESENTATIVE** of the equitable rights of the inhabitants of a village to the use of a public square, and is authorized to file a bill in equity to prevent the erection of a nuisance therein. *Watertown v. Cowen*, 80.
2. **MUNICIPAL CORPORATION IS INDICTABLE FOR NEGLIGENCE TO REMOVE A NUISANCE** in a public river, or basin connected therewith, which it has lawful power to remove. *People v. Albany*, 95.
3. **CORPORATION OF ALBANY HAS POWER TO CLEANSE THE BASIN** in the Hudson river at the termination of the Erie canal, if it can be done by excavating or deepening the channel, and is liable to indictment for a neglect to do so, whereby accumulations of deposits are suffered to continue in such basin which are injurious to the public health. *Id.*
4. **SUCH CORPORATION HAS NO POWER TO REMOVE THE BULKHEAD** at the end of such basin erected by a joint stock company, under a special act of the legislature, even though a nuisance to the public health is occasioned thereby, and is not subject to indictment for neglecting to do so. *Id.*

5. CORPORATION HAS ONLY SUCH POWERS as are conferred by its charter or other statutes. *Id.*
6. MUNICIPAL CORPORATION MAY APPLY ITS LAND TO A DIFFERENT USE from that for which it was designated when the town was originally laid off, where such corporation has by its charter power "to do all things necessary to be done by corporations." *Memphis v. Wright*, 489.
7. LAND SET APART FOR A PUBLIC PROMENADE, in laying off a town by the town proprietor, may be appropriated to use as a steamboat landing by the corporate authorities, if they deem it necessary to promote the prosperity of the town. *Id.*

See EMINENT DOMAIN, 2; MANDAMUS, 1.

### MURDER.

See CRIMINAL LAW; HOMICIDE.

### NAME.

See SIGNATURES.

### NEGOTIABLE INSTRUMENTS.

1. STATUTE REQUIRING A BOND OF INDEMNITY in actions on lost notes applies only to negotiable notes. *Blade v. Noland*, 126.
2. COURT WILL NOT PRESUME A LOST NOTE to be negotiable. *Id.*
3. MAKER OF A NOTE TRANSFERRED AFTER DUE CAN NOT SET OFF against it a note against the payee purchased before the transfer where he was indebted to the payee at the time of such transfer, on other demands, exceeding the amount of the note so purchased. *Collins v. Allen*, 130.
4. INDORSEMENT IS EQUIVALENT TO THE DRAWING of a new bill. *Aymar v. Sheldon*, 137.
5. INDORSEMENT IS GOVERNED BY THE LAW OF THE COUNTRY where it is made, with respect to the rights and liabilities growing out of it, though the bill was drawn and made payable in a foreign country. *Id.*
6. WHERE A BILL, DRAWN AND PAYABLE IN COUNTRIES WHERE THE FRENCH LAW PREVAILS, is indorsed in New York, in order to charge the indorser, presentment for payment and protest must be made according to the French law, but notice must be given according to the New York law. *Id.*
7. AFTER PROTEST FOR NON-ACCEPTANCE IN SUCH A CASE, the presentment for payment required by the French law is unnecessary to charge the indorser in New York. *Id.*
8. SPECIAL INDORSEMENT is necessary in such a case if the indorser desires to protect himself by requiring the holder to take the steps necessary under the French law to charge the drawer. *Id.*
9. THE BILLS OF AN INSOLVENT BANK are not satisfaction of a debt, although they are current at the place where they were given, neither party knowing of the insolvency. *Ontario Bank v. Lightbody*, 179.
10. A POSTDATED CHECK is payable at sight, or upon presentment thereof at the bank, at any time on or after the day of its date. *Mohawk Bank v. Broderick*, 192.
11. IN PRESENTING A CHECK FOR PAYMENT, reasonable diligence must be used; and what is such diligence must in some measure depend upon the particular circumstances of each case. *Id.*

12. THE QUESTION OF REASONABLE DILIGENCE is a mixed question of law and of fact, to be decided by the jury under the direction of the court upon a general verdict, or to be decided by the court, where all the facts and special circumstances of the case are found by a special verdict. *Id.*
13. PUTTING A CHECK IN CIRCULATION does not excuse subsequent holders from using diligence in presenting it for payment. *Id.*
14. OMITTING TO PRESENT A CHECK for twenty days where the holder and bank are but sixteen miles apart, with daily mail between the towns, releases the payee who negotiated it. *Id.*
15. A PERSON TO WHOM A PROMISSORY NOTE has been transferred, and who claims to be a *bona fide* purchaser for value, can not be called upon in an action upon the note to show the consideration that he paid for it, unless express notice is given to him prior to the trial that he will be compelled to do so. *Beltzhoover v. Blackstock*, 330.
16. NOTICE—PUBLICATION IN A NEWSPAPER OF EQUITIES existing in favor of the maker or indorser of a promissory note, will not affect a purchaser for value without notice of such equities, although he may be a regular subscriber of such paper. *Id.*
17. WHERE NEGOTIABLE PAPER HAS BEEN LOST OR STOLEN, or obtained by duress, or put in circulation by fraud, upon proof of these circumstances it is incumbent upon the plaintiff to show that he purchased such paper *bona fide*, and for a valuable consideration. *Id.*
18. A NOTE, GIVEN FOR WORK DONE UNDER COVENANT, is an admission that the work was done as required by the stipulations of the covenant. *Costelo v. Cave*, 404.
19. A NOTE FOR THE AMOUNT DUE ON A COVENANT is not an absolute satisfaction and discharge thereof; and if not paid at maturity, the creditor may sue upon the covenant. *Id.*
20. HOLDER IS NOT BOUND TO KNOW THE PLACE OF RESIDENCE of the indorser of a note for the purpose of giving him notice in order to charge him. *Nichol v. Bate*, 505.
21. WHERE THE HOLDER USES DUE DILIGENCE to ascertain the indorser's place of residence, and from information thus obtained sends the notice to the wrong post-office, it is nevertheless sufficient. *Id.*
22. DUE DILIGENCE IS A QUESTION FOR THE JURY in such a case. *Id.*
23. PLEA OF NON ASSUMPSIT BY AN INDORSER NOT SWORN TO as required by the act of 1819, admits the making and indorsement of the note, and requires only proof of demand and notice to render him liable. *Smith v. McManus*, 519.
24. NOTARY'S PROTEST AND CERTIFICATE THAT HE HAS GIVEN NOTICE are *prima facie* evidence of demand and notice. *Id.*
25. HOLDER'S INDORSEMENT IN BLANK OF A NOTE DEPOSITED WITH A BANK for collection, in accordance with a rule of the bank, does not deprive him of his right to sue upon it in his own name if not paid. *Id.*
26. WHERE A NOTE, THE CONSIDERATION of which fails by reason of the fraud of the payee, is assigned to a third person for value, a right of action to the extent that the consideration fails, accrues to the latter immediately upon the assignment, and he may, in an action against him by the payee, set off such cause of action without waiting to have such failure of consideration established by record evidence. *Gee v. Williamson*, 628.
27. WHERE THE CONSIDERATION OF A NOTE FAILS IN PART by the fraud of

the payee, who indorses it to a third person for value, he is not entitled to demand and notice to render him liable to the extent to which the consideration fails. *Id.*

28. ACCEPTANCE IN PAYMENT OF A DEBT OF THE NOTES OF AN INSOLVENT BANK, the fact of the insolvency being at the time unknown to either party operates as a discharge of the debt. *Lowrey v. Murrell*, 651.

See EVIDENCE, 7, 8, 9.

#### NEW TRIALS.

NEW TRIAL WILL NOT BE GRANTED ON THE GROUND OF SURPRISE, because the plaintiff claims and gets a verdict for additional damages to those specified in such statement. *Beebe v. Robert*, 132.

See VERDICT.

#### NOTICE.

See JUDICIAL NOTICE: LICENSE, 3, 4, 6; NEGOTIABLE INSTRUMENTS.

#### NUISANCE.

See MUNICIPAL CORPORATIONS, 2.

#### OFFICE AND OFFICERS.

CLERK TAKING A DEFECTIVE APPEAL BOND IS NOT LIABLE therefor to an action by the appellee, because the act is necessarily done in the presence, and presumably under the direction and to the satisfaction of the court. *McAllister v. Scrice*, 504.

See PROCESS.

#### ORPHANS' COURTS.

See PROBATE COURTS.

#### OUSTER.

See LANDLORD AND TENANT, 6, 7, 8, 9.

#### PARDON.

See CRIMINAL LAW, 9, 10.

#### PARTITION.

A MINOR, TO WHOM A TRACT OF LAND HAS BEEN DEVISED, is not bound by a partition made by other devisees of the same testator of land devised to them, and of his land, by which a portion of both tracts is set off to him, although upon attaining majority, he exercised acts of ownership over the part so set off to him. *Hemrich v. High*, 295.

#### PARTNERSHIP.

1. REAL ESTATE CAN ONLY BECOME PARTNERSHIP PROPERTY BY DEED, or other writing properly recorded, indicating an intention to make it such. *Hale v. Henrie*, 289.
2. A BILL FOR AN ACCOUNT BETWEEN PARTNERS will not lie for the breach of a particular stipulation of the articles of partnership, for which an adequate remedy at law by recovery of damages exists. *Kinloch v. Hamlin*, 441.

3. PARTNERSHIP REALTY, ON THE DEATH OF A PARTNER, is not distributed as personal stock, but descends to the heirs. *Yealman v. Woods*, 452.
4. PARTNERSHIP IS ESTABLISHED BY PROOF of an actual community of interest, accompanied by an agreement to participate in the profits, and contribute to the losses of the concern. *Brown v. Higginbotham*, 618.
5. LEASING OF A FARM BY ONE PERSON and placing men to work thereon by another, under the former's management, upon an agreement that the net profits, after deducting all expenses, shall be divided between them, constitutes a partnership between such parties. *Id.*
6. PAYMENT BY ONE PARTNER OF DEBTS of the partnership with money held by him as agent of another, makes all the members of the partnership liable to the latter for the amount so paid, although such payment was made after the partnership had been dissolved. *Id.*
7. UNTIL THE AFFAIRS OF A PARTNERSHIP are settled, and outstanding engagements made good, it continues in legal contemplation, so far, at least, as respects winding them up. *Id.*

#### PATENTS FOR LAND.

See GRANTS.

#### PAYMENTS.

1. WHERE A PARTY, WHO IS INDEBTED to another upon two different accounts, pays an order drawn on him by such other, he may appropriate the amount so paid as a payment upon either account. *Vicary v. Moore*, 323.
2. PAYMENT OF PART OF A DEBT BY A DEBTOR does not satisfy the whole, even if so received by the creditor. *Shaw v. Clark*, 578.
3. ACCEPTANCE OF AN ORDER FOR MONEY, in payment of a debt, discharges the debt, unless fraud intervenes or some failure happens. *Harrison v. Hicks*, 638.
4. PAYMENT OF A DEBT BY ONE WHO IS NOT A PARTY to the contract, although made without the assent of the debtor, extinguishes the debt. *Id.*
5. AN AGREEMENT WITHOUT CONSIDERATION TO PAY A DIFFERENT COMPENSATION, and one of a character not more certain than that originally stipulated, in discharge of a liability upon a completed contract, is not binding, nor does it discharge the original contract. *Randolph v. Berry*, 659.

See ASSUMPSIT, 2.

#### PLEADING AND PRACTICE.

1. AN INDIVIDUAL MAY JOIN WITH THE MUNICIPALITY to prevent the erection of buildings on lands dedicated to a public use. *Watertown v. Cowen*, 80.
2. MISJOINDER MUST BE TAKEN ADVANTAGE OF by demurrer or by answer; objection comes too late at the hearing. *Id.*
3. A PROPER CASE FOR A BILL WITH A DOUBLE ASPECT is, where the complainant is in doubt whether he is entitled to one kind of relief or another, upon the facts as stated in the bill; in such case he may frame his prayer in the alternative. *Lloyd v. Brewster*, 88.
4. *IDEM.*—So if the nature of the complainant's relief depends upon the ex-

istence or non-existence of a particular fact, not within his knowledge, he may allege his ignorance, call for a discovery, and frame his prayer in the alternative. *Id.*

5. **IDEM.**—But a vendor can not treat a sale as valid and recover judgment for the price, and at the same time repudiate the sale for fraud, and proceed to recover the goods from third persons to whom they have been assigned for value. *Id.*
6. **ELECTING BETWEEN FORM OF ACTION.**—A vendor of goods on whom a fraud has been practiced, may elect either to affirm the sale, and proceed as a judgment creditor, or to avoid the sale and follow the goods into the hands of one who has not parted with value on the faith of them. *Id.*
7. **AN AMENDMENT WILL NOT BE ALLOWED** which changes the whole character of the litigation. *Id.*
8. **AMENDABLE VARIANCE BETWEEN THE DECLARATION** and the proof is no ground of nonsuit. *Boorman v. Jenkins*, 158.
9. **THE CASE STATED IN AN EXCEPTION** will, by the revising court, be presumed correct, until its error clearly appear from examination of the whole of the record before it. *Den v. Graham*, 226.
10. **PLEA THAT SEALED NOTE WAS OBTAINED BY FRAUD**, covin, and misrepresentation is good on demurrer; and fraud may be specially pleaded in bar, without averring the acts constituting the fraud, even where evidence thereof might be given under the general issue. *Saunders v. Stotts*, 263.
11. **WRIT OF ERROR CORAM NOBIS** lies to examine into an error in fact *dehors* the record in a judgment of the supreme court. *Dows v. Harper*, 270.
12. **SUBMISSION OF A FACT** to a jury without there being some evidence thereof, as one that may nevertheless be found, is an encouragement to err which can not be too closely observed or unsparingly corrected. *Stouffer v. Latahaw*, 297.
13. **PLEA PUIS DARREIN CONTINUANCE** should show the date of the last continuance, and that the matter sought to be pleaded arose since that time. Averring that the matter arose since issue joined is insufficient. *Vicary v. Moore*, 323.
14. **JURY MAY CERTIFY A BALANCE** in favor of the defendant in an action of covenant. *Id.*
15. **TO AVOID CIRCUTTY OF ACTION** where persons are liable over amongst themselves, the responsibility of those last to be charged being secured by mortgage of their property or judgment lien thereon, the court will order the sale of the premises, and the payment of the necessary proceeds to the first claimants. *Stoney v. Shultz*, 429.
16. **PUBLICATION OF NOTICE TO CREDITORS** to come in and prove their demands, after a final decree for the sale of premises, ordered by the court for the purpose of raising a fund for the satisfaction of such demands, is unnecessary where there has been ample notice before the decree of sale was rendered. *Id.*
17. **OBJECTION OF A WANT OF PROPER PARTIES**, if not taken in the court below by demurrer or otherwise, can not be raised in the supreme court. *Reeves v. Dougherty*, 496.
18. **ON A DECLARATION SETTING FORTH A JOINT UNDERTAKING** to construct a mill, and the negligent and unskillful conduct of the defendant,

whereby plaintiff was greatly damaged, the plaintiff must prove the joint contract, to enable him to recover. *Wright v. Geer*, 538.

19. WHERE AN EXPRESS CONTRACT is necessary to create a liability, it must be stated, and must be proved as laid. *Id.*
20. A DEFENDANT SUFFERING A DEFAULT can not except to testimony taken on the inquest, but may cross-examine witnesses. *Morton v. Bailey*, 767.

See CRIMINAL LAW, 7, 8; EQUITY, 12, 13; SUNDAY, 3, 4,

#### PRE-EMPTION.

See GRANTS, 4.

#### PRINCIPAL AND AGENT.

See AGENCY.

#### PRINCIPAL AND SURETY.

See SURETYSHIP.

#### PRIVILEGED COMMUNICATIONS.

See LIBEL.

#### PRIVITY.

See ORPHANS' COURT, 6, 7, 12, 13.

#### PROBATE COURTS.

1. COURTS OF PROBATE ACT IN REM, and their sentences, upon matters within their jurisdiction, are conclusive upon other courts. *Redmond v. Collins*, 208.
2. COURTS OF PROBATE WILL RECALL THEIR OWN SENTENCES for re-examination, at the instance of parties interested who have been, neither in fact nor in legal contemplation, privy to the proceedings upon which the sentences were based. *Id.*
3. PROBATE IN COMMON FORM is where a will has been admitted to probate upon proceedings to which the executor alone is party. *Id.*
4. PROBATE IN SOLEMN FORM is where, by summons to see proceedings, the executor has called in the parties interested to witness the proceedings, and to take what part therein they see fit. *Id.*
5. PARTIES IN INTEREST MAY INTERVENE in a matter of probate, though summons to see proceedings has not issued. *Id.*
6. SENTENCES OF COURTS OF PROBATE ARE NOT RE-EXAMINABLE at the instance of parties who have been privy to the proceedings. *Id.*
7. PRIVACY TO PROCEEDINGS IN A COURT OF ORDINARY MAY BE PROVED by the allegations filed in the proceedings, by the summons to "see proceedings," and by the testimony of witnesses, or by other matter *in pais*. *Id.*
8. NEXT OF KIN WILL BE BOUND BY A SENTENCE admitting a will to probate, though not party to the proceedings, nor summoned to "see proceedings," if, at the time of any prior contest over the probate, they had notice thereof and did not intervene. *Id.*



9. **EXECUTOR CAN NOT REPROFOUND** a testament, pronounced against when first offered by him, otherwise than upon the ground of newly discovered evidence. *Id.*
10. **THE EXECUTOR IS THE PROPER PERSON** to prove the testament, and will, at the instance of parties interested, be summoned by the ordinary to produce it, and either prove it and take upon himself its execution, or else renounce it. *Id.*
11. **IF THE EXECUTOR RENOUNCES**, any party in interest may propound the testament. *Id.*
12. **EXECUTOR IS IN PRIVITY** with the legatees claiming under the testament, and sentences against the testament, propounded by him, will be binding against them, even though they were, at the time of the sentence, laboring under such disabilities as coverture, or infancy, or even if at that time they were not yet *in esse*. *Id.*
13. **EXECUTOR AND DEVISEE ARE NOT IN PRIVITY** at common law, nor are they made so by the statute permitting courts of probate to establish wills of real estate. *Id.*
14. **DEVISEE MAY NOT REPROFOUND** to the probate court, in its dual character of will and testament, an instrument before rejected by it, when propounded by the executor named therein. *Id.*
15. **DEVISEE MAY MAINTAIN EJECTMENT** upon the will, after it has been rejected by the court of probate, when propounded to it by the executor. *Id.*
16. **COURTS OF PROBATE HAVE NO CONCERN** with the trusts of a will; for them, it is sufficient that the instrument under their consideration is adequate to pass the legal title. *Id.*
17. **SENTENCES OF COURTS OF PROBATE AGAINST TRUSTEES** who have had notice, are binding, as far as that court is concerned, upon the *cestui que trust*. *Id.*
18. **CONFIRMATION BY THE ORPHANS' COURT** of a sale of land by an administrator, made subsequent to the time to which the order directing the sale was made returnable, is tantamount to the continuance of such order to the time that the sale was actually made, and such sale can not be collaterally attacked as void. *Klingensmith v. Bean*, 328.
19. **DECRIES OF THE ORPHANS' COURT** stand upon the same footing as judgments of a court of common law, and can not be examined collaterally in an action of ejectment. *Id.*

See JUDGMENTS 5, 7.

#### PROCESS.

1. **CAPTAIN OF A MILITIA COMPANY MAY IMPOSE FINES** upon the members thereof for neglect to perform military duty when lawfully required, and after due notice, may issue his warrant for the collection of such fines. *Hall v. Howd*, 696.
2. **WARRANT CAN BE ISSUED ONLY BY THE OFFICER IMPOSING** such a fine. *Id.*
3. **VOID WARRANT IS NO PROTECTION** to the officer executing it. *Id.*
4. **WARRANT ISSUED BY A MAGISTRATE OR OFFICER OF LIMITED JURISDICTION** must show on its face that he had jurisdiction of the subject-matter, the person, and the process. *Id.*
6. **CAPTAIN'S WARRANT FATALLY DEFECTIVE, WHEN.**—A warrant by the captain of a militia company, for the collection of a fine for neglect of mili-

tary duty, stating that such fine was legally imposed, but not stating or showing by reference to any other document, who imposed the fine, is void on its face, and the officer who executes it is liable in trespass. *Id.*

### QUESTIONS OF LAW AND OF FACT.

See BOUNDARIES, 4; DEDICATION, 13; EXECUTIONS, 22; NEGOTIABLE INSTRUMENTS, 12, 23.

### REAL ESTATE.

See BOUNDARIES; GRANTS; IMPROVEMENTS.

### RECORDING.

See DEEDS; EVIDENCE, 30.

### REFEREES.

See RES ADJUDICATA, 1, 2, 3.

### RELIGIOUS CORPORATIONS.

See CORPORATIONS.

### REMAINDERS AND REVERSIONS.

See LEGACIES AND LEGATEES, 8, 12, 13, 14, 15, 16, 17.

### RES ADJUDICATA.

1. REJECTION OF A DEMAND OFFERED AS A SET-OFF IN A FORMER ACTION, on a trial before referees, is no bar to a subsequent action thereon, if such demand could not legally have been allowed as a set-off. *Beebe v. Bull*, 150.
2. REFEREES STAND IN THE PLACE OF A JURY in such a case. *Id.*
3. DECISION OF REFEREES ON A COLLATERAL POINT is not evidence in a subsequent action directly involving that question. *Id.*
4. A PLEA OF RES ADJUDICATA is insufficient, unless it appears that the matters stated in the complaint and alleged to have been unavailingly set up as a defense in a former action, were positively decided in such former action against the present plaintiff. *Noyes v. Evans*, 579.
5. DEFAULT ON THE PART OF A PERSON to pay the debt of another to a certain bank in installments in pursuance of a written agreement to that effect, can not be proved by the record in a suit brought by such bank against both of such persons and another on a note signed by them, in which an execution was issued against all three and returned "satisfied," the note being for a less amount than the debt agreed to be paid and due at a different and subsequent time. *Gee v. Williamson*, 628.
6. WHATEVER IS ONCE ESTABLISHED between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case. *Id.*

See JUDGMENTS.

### RIPARIAN OWNERS.

See WATER-COURSES.

## SALES.

1. **SALE BY SAMPLE** is in judgment of law a warranty that the bulk of the commodity corresponds in quality with the sample. *Beebe v. Robert*, 132.
2. **DRAWING OF FRESH SAMPLES BY A PURCHASER OF PACKED COTTON** to ascertain if they correspond with the first samples, does not make it any the less a sale by sample, and the vendor is liable on his warranty, if the bulk of the cotton does not correspond with the samples. *Id.*
3. **SALE BY SAMPLE IS PER SE A WARRANTY** that the bulk shall correspond with the sample. *Boorman v. Jenkins*, 158.
4. **EVERY SALE OF PACKED COTTON IS A SALE BY SAMPLE**, of necessity, and by established usage. *Id.*
5. **WHERE ANY SALE OF COTTON IS CLAIMED TO BE AN EXCEPTION** to this rule, the burden of proof rests upon the party asserting that fact. *Id.*
6. **OFFER TO RETURN GOODS SOLD WITH A WARRANTY**, either express or implied, is not necessary before bringing an action for damages for the breach of such warranty. *Id.*
7. **PURCHASER HAVING PAID THE PURCHASE MONEY** for goods sold to him with a warranty, is not precluded from maintaining an action on the warranty, although he made payment after notice from a purchaser from him that the goods were defective, but before the extent of the damage was ascertained. *Id.*

See AGENCY, 10.

## SCHOOLS.

1. **SCHOOL DISTRICT IS LIABLE TO BE SUED** without any express statute giving the action. *McLoud v. Selby*, 689.
2. **EXECUTION AGAINST A SCHOOL DISTRICT MAY BE LEVIED ON INDIVIDUAL PROPERTY** of an inhabitant thereof. *Id.*
3. **INHABITANT WHOSE PROPERTY IS TAKEN UNDER SUCH EXECUTION** can not impeach the judgment upon which it issued. *Id.*

## SET-OFF.

1. **JUDGMENTS MAY BE SET OFF** against each other, if the rights of third persons are not affected thereby; but where the rights of an equitable assignee for value would be affected, this right can not be exercised. *Ramsey's Appeal*, 301.
2. **THIRD PERSONS CAN NOT TAKE ADVANTAGE** of an irregularity in the assignment of a judgment, if the assignor makes no objection. *Id.*
3. **UNDER THE ACT OF 1705**, a defendant who establishes a set-off in excess of plaintiff's demand, has no lien upon the latter's real estate for the payment of such excess. It can only be made a lien by judgment in *scire facias*. *Id.*
4. **THE DEFENDANT IS NOT BOUND TO SET OFF HIS DEBT** against the plaintiff's demand, except in suits before a justice of the peace. *Morton v. Bailey*, 767.
5. **UPON A CREDITOR'S EXHIBITING A CLAIM AGAINST AN ESTATE**, the administrator is not bound to set off against such claim a debt due the estate from the creditor. *Id.*

## SHERIFFS.

- A SHERIFF ASSUMING TO ACT VIRTUE OFFICII, warrants that he is possessed of such authority, and if not authorized, is liable to persons who have suffered damage, from steps undertaken under the belief that he was. So a sheriff is liable to purchasers at a sale assumedly made under proper authority, from a court which does not in fact exist. *Stoney v. Shultz*, 429.

See FALSE IMPRISONMENT.

## SIGNATURE.

JUNIOR IS NOT PART OF A PERSON'S NAME in law. *Brainard v. Stiphin*, 532.

## SLANDER.

1. IT IS NOT A FATAL VARIANCE IN SLANDER that all the words laid in the declaration are not proved; it is sufficient that enough be proved to sustain the action. *Purple v. Horton*, 167.
2. FACTS INDUCING BELIEF IN THE TRUTH OF THE CHARGES MADE are not admissible in mitigation of damages. *Id.*
3. FACTS AND CIRCUMSTANCES MAY BE SHOWN IN MITIGATION when they disprove malice, and do not tend to prove the charges, or form a link in the chain of evidence to prove a justification. *Id.*
4. A JUSTIFICATION DOES NOT DISPROVE MALICE, but confirms it. *Id.*
5. IN SLANDER THE SUBSTANCE OF THE WORDS only need be proved; but the proving of words that are tantamount to the words charged is not proving their substance. *Commons v. Walters*, 635.
6. PROOF THAT DEFENDANT SAID to plaintiff, "Are you not afraid, as you have perjured yourself?" is sufficient to sustain an allegation that the former said of the latter, "You are perjured." *Id.*
7. WORDS IMPUTING TO A PERSON the crime of perjury are in themselves actionable, with or without a colloquium, and without proof that such person has taken oath in a judicial proceeding, and without production of proof of such proceeding. *Id.*
8. DECLARATION WHICH CHARGES THAT THE DEFENDANT said to the plaintiff, "He swore a lie," in reference to an affidavit made before a justice of the peace for the purpose of having the defendant bound to keep the peace, states a cause of action, and may be proved by showing that such words were used with reference to such affidavit, without further proof of the proceedings before the justice. *Id.*
9. IN SLANDER, THE SUBSTANCE OF THE WORDS only need be proved. *Stocumb v. Kuykendall*, 764.
10. IDEM—BUT THE PROVING of words of similar import is not proving the substance of the words laid. *Id.*

## SPECIFIC PERFORMANCE.

1. PAYMENT OF A SUBSTANTIAL PART OF THE PURCHASE MONEY in the execution of a parol agreement for the sale of lands is such a part performance as will take the case out of the statute of frauds, and will warrant a specific performance. *Townsend v. Houston*, 732.
2. A CONTRACT RELATING TO LANDS PARTLY EXECUTED by one of the parties may be proved by parol, and specific performance decreed, in order that one side may not take advantage of the other. *Id.*

3. THE COURT MUST BE ABLE TO ASCERTAIN THE TERMS of an agreement partly performed, in order to warrant a specific performance. *Id.*
4. EQUITY DECIDES UPON EQUITABLE GROUNDS IN CONTRADICTION to the positive enactments of the statute of frauds, and in case of part performance will admit ~~part~~ testimony to prove a parol contract relative to land. *Id.*
5. THE ACT RELIED UPON AS PART PERFORMANCE should be such as would not have been done independent of some agreement or contract relative to land. *Id.*
6. THE ACT MUST, TO A CERTAIN EXTENT, BE A JOINT ACT, or such as clearly indicates a mutual assent. *Id.*
7. ENTERING INTO POSSESSION BY THE VENDEE with the consent of the vendor, is a part performance which will entitle the vendee to prove the terms of the contract by parol. *Id.*
8. THE DISTINGUISHING PRINCIPLE is that the part performance must be something done in the execution of the agreement, and not as preparatory or as inducement. *Id.*
9. THE RECEIPT OF THE PURCHASE MONEY BY THE VENDEE, proved by writing, is a part execution of a contract for the sale of land. *Id.*

## STATUTES.

See ACTIONS; CRIMINAL LAW, 1.

## STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF ONE who is the owner of a tract of land, and the agent of an adjoining tract, so as to give him a title to a part of the land of his principal, which has been occupied by him under a mistake as to the true boundary line. *Comegys v. Carley*, 356.
2. THE STATUTE OF LIMITATIONS will run in favor of a permissive occupancy, if its inception was under a parol gift of the land. *Sumner v. Murphy*, 397.
3. STATUTE OF LIMITATIONS PROTECTS FRAUDULENT POSSESSION.—The statute of limitations applies where possession was acquired by fraud. *Reeves v. Dougherty*, 496.
4. STATUTE OF LIMITATIONS IS A GOOD PLEA IN EQUITY where it would be good at law if the suit had been brought there, except where there has been a fraudulent concealment of the cause of action. *Id.*
5. GRANTEE OF PROPERTY CONVEYED IN FRAUD OF CREDITORS may plead the statute of limitations to a bill filed by a creditor. *Id.*
6. STATUTE BEGINS TO RUN IN SUCH A CASE when the grantee obtains possession. *Id.*
7. TIME DOES NOT RUN against the commonwealth. *French v. Commonwealth*, 613.
8. STATUTE OF LIMITATIONS DOES NOT OPERATE IN A COURT OF EQUITY, *proprio vigore*, but courts of equity will not lend their aid to claims which are barred in a court of law. *Belknap v. Gleason*, 721.
9. EQUITABLE REMEDY IS LOST only where the analogous legal remedy is barred by statute. *Id.*
10. MORTGAGE MAY BE ENFORCED IN EQUITY ON A NOTE barred by statute if the period necessary to bar an ejectment at law for the land has not elapsed, and the note is still unpaid. *Id.*

11. DEBT IS NOT CANCELED BY THE RUNNING of the statute of limitations, which is merely a statute of repose, but the remedy only is suspended. *Id.*
  12. NO PRESUMPTION OF PAYMENT ARISES from the running of the statute on a promissory note, so as to cut off the creditor's right to enforce a lien given to secure such note. *Id.*
  13. INFERENCE IS THAT A NOTE BARRED BY STATUTE IS UNPAID when the creditor comes into equity to enforce a mortgage given to secure the same, and it appears that there is no fact other than the lapse of time to warrant a presumption of payment, and that the debtor had no property other than the land mortgaged. *Id.*
  14. FINDING IN SUCH A SUIT THAT THE DEBT IS UNPAID WILL NOT CONCLUDE the defendant from setting up the statute in an action on the note. *Id.*
- See LANDLORD AND TENANT, 6, 7, 8.

## STREETS.

See DEDICATION, 1, 7.

## SUCCESSION.

AN ILLEGITIMATE CHILD CAN INHERIT from another illegitimate child of the same mother. *Burlington v. Fosby*, 535.

## SUNDAY.

1. FORECLOSURE SALE ON SUNDAY IS NOT A JUDICIAL PROCEEDING, and therefore is not void, unless prohibited by statute. *Sayles v. Smith*, 117.
2. EVEN THOUGH SUCH A SALE WOULD BE VOID, THE NOTICE of it would not necessarily be void, and the creditor may postpone the sale. *Id.*
3. THAT THE ORIGINAL WRIT ISSUED ON SUNDAY is a good plea in abatement. *Haynes v. Sledge*, 665.
4. A REPLICATION TO SUCH PLEA may show facts making of the case an exception to the general rule avoiding such process, and it seems that the circumstances which by statute excuse the service of process on Sunday, also authorize its issuance on that day. *Id.*

## SURETYSHIP.

1. SURETY FOR WHOSE INDEMNITY a trust deed has been given, is entitled to the aid of equity, to prevent the payment of the proceeds of the sale of the trust property under execution, until his liability as surety is ascertained, and is discharged out of such proceeds. *Marshall v. Colbert*, 589.
2. CONTRIBUTION BETWEEN SURETIES WILL BE DECREED whether they be on the same or different bonds, although they knew nothing of the obligations of each other; but they must be sureties for one and the same debt or obligation. *Harrison v. Lane*, 607.
3. A SURETY ON ONE BOND IS NOT ENTITLED TO CONTRIBUTION from a surety on another, if the latter bond was not to be pursued, unless the principal could not obtain payment from the sureties on the former. *Id.*
4. SURETY ENGAGING TO PAY only if the creditor can not get payment from other sureties, is not liable to contribution at the suit of the latter. *Id.*
5. PROPERTY MORTGAGED TO A SURETY TO SECURE HIM for indorsing the mortgagor's note, whether such property be real or personal, may be

subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent. *New London Bank v. Lee*, 713.

8. CREDITOR NEED NOT LEVY EXECUTION SO AS TO OBTAIN A LIEN upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien on the property so mortgaged. *Id.*

### TAXATION.

1. WHERE THE ILLEGALITY APPEARS ON THE WARRANT for the collection of taxes, an adequate remedy at law lies by an action at trespass, should the payment of the tax be attempted to be enforced by a sale of the property. *Bank of Utica v. Utica*, 72.
2. THE PERSONAL PROPERTY OF A BANK SUBJECT TO TAXATION is so much of the capital stock paid in or secured as will remain after deducting therefrom the actual cost of all the real estate of the company. *Id.*
3. MONEY VOLUNTARILY PAID ON AN UNCONSTITUTIONAL ASSESSMENT of taxes can not be recovered from the sheriff, especially after he has paid it into the treasury. *Dickins v. Jones*, 488.

See MANDAMUS, 1.

### TENDER.

1. A TENDER PROPERLY MADE IS A SATISFACTION OF THE DEMAND; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. *Lamb v. Lathrop*, 174.
2. IDEM—THE RELATION OF DEBTOR AND CREDITOR NO LONGER EXISTS between the parties, but that of trustee and *cestui que trust*, or bailor and bailee. *Id.*
3. PLEA OF TENDER OF PERSONALTY NEED NOT AVER that the defendant is still ready to deliver; nor that the tender was made in satisfaction of the debt. *Id.*
4. WHERE PROPERTY HAS BEEN TENDERED as of a certain value, having been appraised by but one of the two appraisers agreed upon by the parties, the tender is not good; both appraisers must act, or the amount in money tendered. *Id.*
5. PROPERTY OF A GREATER VALUE THAN THE DEBT can not be tendered with a demand for the difference; it should be tendered at the amount to be paid; or money should be tendered. *Id.*

### TORTS.

- IF THE DEFENDANT'S TORTIOUS DISREGARD OF A DUTY is the ground of his liability, it would seem not to vary the ground, though a similar duty rested upon another. *Wright v. Geer*, 538.

### TRESPASS.

1. IN TRESPASS TO TRY TITLES DAMAGES MAY BE RECOVERED for the retention of the premises. *Avent v. Read*, 663.
2. TREE STANDING WHOLLY ON ONE'S LAND, BUT EXTENDING ITS ROOTS into, and its branches over, the land of another, belongs nevertheless to the former proprietor, and the latter is liable for the taking and conversion of fruit growing on the branches of such tree, which overhang his land. *Lyman v. Hale*, 723.

See CO-TENANCY, 4, 5; DAMAGES, 4; FALSE IMPRISONMENT.

## TROVER.

See CO-TENANCY, 4, 5.

## TRUSTS AND TRUSTEES.

1. TRUSTS RESULT BY IMPLICATION OF LAW in two cases only: 1. Where a purchaser of land has paid the purchase price with his own money, and taken the conveyance in the name of another, or where he has paid with the money of another and taken the conveyance in his own name; and, 2. Where a trust has been declared of part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue. *Kisler v. Kisler*, 308.
2. PURCHASE OF LAND BY A GUARDIAN, which he declared at the time to be for the use of his ward, is not such a trust as can be enforced by the ward. *Id.* See PROBATE COURTS, 16, 17.

## USAGE.

1. EVIDENCE OF A USAGE AS TO THE MODE OF SELLING COTTON BY SAMPLE, and as to the taking of samples by brokers, and the offering of them to customers for inspection, is admissible in an action on the warranty arising upon such a sale. *Boorman v. Jenkins*, 158.
2. PAROL EVIDENCE IS ADMISSIBLE TO APPLY A WRITTEN CONTRACT to the subject-matter, and in some instances to explain expressions used in a peculiar sense, by particular persons, as applied to particular subjects. *Id.*
3. WHERE THERE IS A WRITTEN CONTRACT, EVIDENCE OF A USAGE is in many instances admissible to annex incidents to the written instrument concerning which it is silent. *Id.*
4. EVIDENCE OF A USAGE BY A COTTON BROKER not to make entry of the fact that sales of cotton made by him were made by sample, is admissible, where upon a particular sale there is no reference in the entry in his book, and in the sale note and bill of parcels, that the sale was by sample, and the sale may then be shown by parol to have been so made. *Id.*

See COMMON CARRIERS, 4, 10; DEDICATION, 11, 14.

## VARIANCE.

See PLEADING AND PRACTICE, 8; SLANDER, 1, 5, 9.

## VENDOR AND VENDEE.

1. A COVENANT TO CAUSE TO BE CONVEYED BY GOOD AND SUFFICIENT WARRANTY DEED, is not complied with by the mere giving of a warranty deed where the warrantor has no title, or an imperfect title to the land. *Everson v. Kirtland*, 91.
2. *IDEM.*—It must be a deed good and sufficient, both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed. *Id.*
3. THE EXISTENCE OF THE VENDOR'S LIEN on land for the unpaid purchase money, even as between vendor and vendee, is in North Carolina not yet settled. *Johnson v. Cawthorn*, 250.
4. SUCH LIEN CERTAINLY DOES NOT EXIST as against creditors of the vendee, enforcing their debts, nor as against purchasers at execution sale, who bought with notice that the purchase price of the land was not yet paid. *Id.*



5. **COVENANT TO CONVEY, CONSTRUCTION OF.**—Where one party to a contract, in consideration of the other party's undertaking to pay him for a tract of land, covenants to convey the land to such party, without naming any time for performance, the payment of the money, not the promise to pay it, is the real consideration for the promise to convey; and in an action on such covenant the plaintiff must aver either that he paid the money, or that he has tendered, and is ready and willing to pay it. *McCoy v. Bibbee*, 258.

See COVENANTS IN DEEDS; JUDGMENTS, 2; LICENSE; LIENS, 2; SPECIFIC PERFORMANCE.

#### VERDICT.

1. **A VERDICT WILL NOT BE SET ASIDE**, because the jurors by whom it was given knew of facts affecting the credibility of the witnesses in the case. *McKain v. Love*, 401.
2. **THE VERDICT OF THE JURY**, "We find the defendant guilty of murder," written on the envelope of the indictment, on which no part of the indictment is written, but which is indorsed with the title of the case, the finding of the grand jury, and the names of the witnesses, and where there is no question raised, but that as a matter of fact, the finding of the jury refers to the indictment under which the prisoner was tried, will be held to be of sufficient certainty as to person and offense. *State v. Ferguson*, 412.

#### WARRANTS.

See PROCESS, 2, 3, 4, 5; TAXATION, 1.

#### WARRANTY.

See COVENANTS IN DEEDS, 3, 6, 7; SALES.

#### WASTE.

See DOWER, 2; INJUNCTIONS.

#### WATER-COURSES.

1. **ONE WHO ERECTS A MILL AND DAM** upon a stream, does not, by mere priority of occupation, acquire such an exclusive right in the stream as to enable him to maintain an action against a person erecting a mill and dam above his, by which the water is partly diverted and he thereby injured. *Hoy v. Sterrett*, 313.
2. **USE OF WATER IN A FLOWING STREAM** is open to all, subject to the restriction, that a person is not permitted to use it to the injury of those through whose land it passes. *Id.*
3. **A RIPARIAN PROPRIETOR CAN ACQUIRE NO EXCLUSIVE PRIVILEGE** in running water by mere priority of appropriation. *Id.*
4. **EVERY RIPARIAN OWNER** is entitled to use the water of a stream flowing through his land, although the owner of a mill lower down on such stream is injured thereby, provided such use is ordinary and proper. Such injury is *damnum absque injuria*. *Id.*
5. **AN IMPROPER OR MALICIOUS USE** of flowing water by one riparian proprietor renders him liable in damages to another lower down on the same stream. *Id.*
6. **A RIPARIAN PROPRIETOR** is entitled to the accustomed flow of the stream

passing through his land, and may sustain an action for any damage done him by the act of the proprietor below, who has dammed up the stream so as to throw the water back upon him, or by the proprietor above, who by diverting the water has decreased its flow through his lands. *Omelvany v. Jagers*, 417.

See EMINENT DOMAIN, 1.

### WILLS.

1. CONSTRUCTION OF WILL.—Where a testator devises all his property to his wife during life or widowhood, and then provides as follows: "My wife are to have an equal portion of the property with the children: if she marries, there is to be an equal division with her and my children of the whole property: there is to be a division each time that either of my children arrives at the age of twenty-one years, with them and my wife; if she marries, she is not to share with the children in their separate division; should either of them lose their breath entirely, she is not to share with my children neither;" the wife, if she continues sole, is to share equally with the children, and as each becomes of age or marries, there is to be a division, such one taking his portion absolutely, the residue remaining in common until another like event, until at last the wife and the last remaining unmarried or infant child share equally in the residue. If the wife marries, there is then to be an equal division between her and the children, she taking her portion, leaving the residue in common among the children, to be divided as each becomes of age or marries, such one then taking his portion absolutely, and if any one of the children die before marriage or coming of age, his portion is to vest in the surviving children, the wife taking no share therein. *Frierson v. Van Buren*, 528.
2. BEQUEST IS OF THE ESTATE AS AN AGGREGATE FUND to the children as a class in such a case, they taking as tenants in common, and if one dies before twenty-one or marriage, the estate survives to the others. *Id.*
3. HEIRS OF A CHILD DYING UNDER AGE, AND UNMARRIED, other than the surviving children of the testator, are entitled to no part of the estate so devised. *Id.*
4. IN CONSTRUING A WILL, THE INTENT OF THE TESTATOR is the great point to be ascertained and effectuated. *Boisseau v. Aldridges*, 590.
5. HEIR MAY BE DISINHERITED BY IMPLICATION, if such implication be necessary to effect the clear intent of the testator. Necessary implication results from so strong a probability of intention, that an intention contrary to that imputed to the testator, can not be supposed. *Id.*
6. HEIR CAN NOT BE DISINHERITED UNLESS THE ESTATE IS GIVEN to somebody else. *Id.*
7. WRITING TO PREVENT TWO HEIRS NAMED THEREIN from having any part of the writer's estate, but not making any disposition of his property, can not operate to disinherit the two heirs named, and to give the estate to the other heirs; and this is true, although from bequeathing a contingent legacy, the writing is testamentary in its character, and entitled to admission to probate. *Id.*

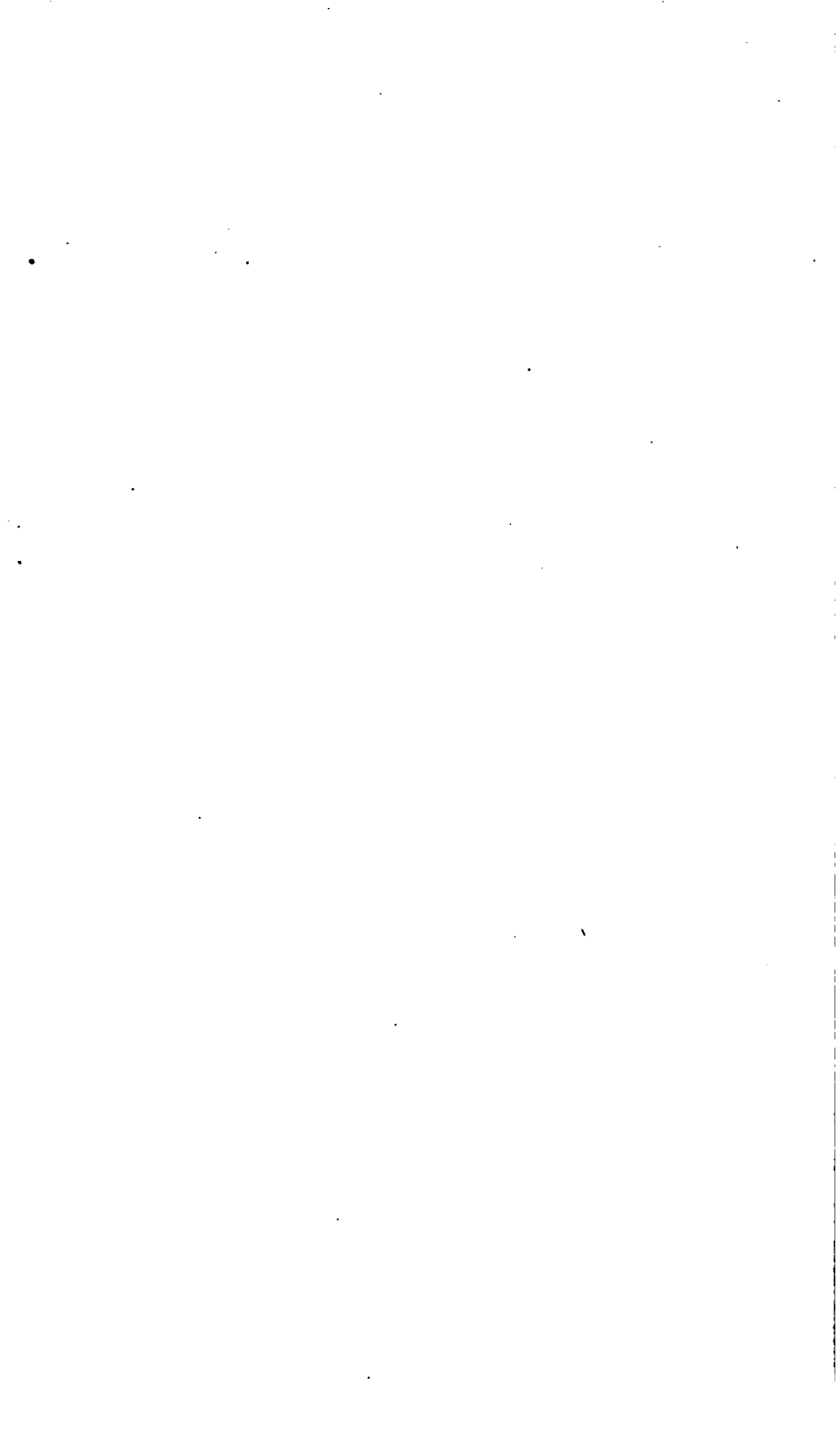
See LEGACIES and LEGATEES.

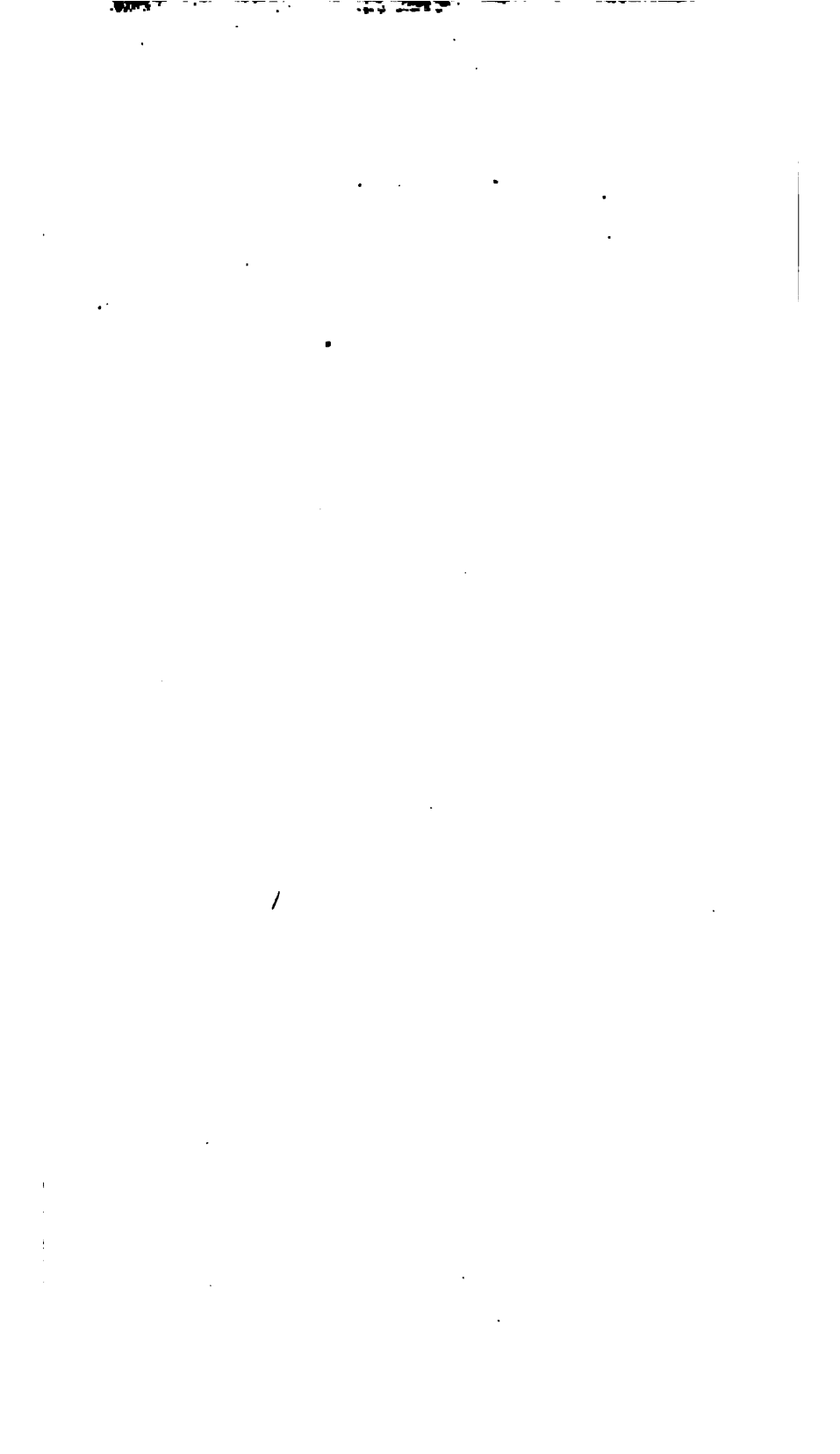
### WITNESSES.

See COSTS; EVIDENCE.



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